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Attorneys for Petitioner A&B Irrigation District

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A&B IRRIGATION DISTRICT, Petitioner, vs. **DAVID R. TUTHILL, JR.,** in his official capacity as director of the Idaho Department of Water Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,** Respondents.	CASE NO. CV-07-655 **AFFIDAVIT OF TRAVIS L. THOMPSON**

STATE OF IDAHO)
)ss
County of Minidoka)

TRAVIS L. THOMPSON, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys representing A&B Irrigation District in this matter. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit A** is a true and correct copy of the Idaho Department of Water Resources' *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 *et seq.*

3. Attached hereto as **Exhibit B** is a true and correct copy of the Idaho Department of Water Resources' *Opening Brief on Appeal* in *AFRD #2 v. IDWR* (Supreme Court Case Nos. 33249/33311/33399) filed with the Idaho Supreme Court on October 27, 2006.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Idaho Department of Water Resources' *Memorandum in Opposition to Preliminary Injunction and in Support of Motion to Dismiss* filed in *IGWA v. IDWR* (Jerome County Dist. Ct., Fifth Jud. Dist., Case No. CV-2007-526) on May 22, 2007.

5. Attached hereto as **Exhibit D** is a true and correct copy of the Idaho Supreme Court's Opinion in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

6. Attached hereto as **Exhibit E** is a true and correct copy of the Idaho Supreme Court's Opinion in *AFRD #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007).

Further you affiant sayeth nought.

DATED this 25th day of September 2007.

Travis L. Thompson

SUBSCRIBED AND SWORN to before me this 25th day of September, 2007.

JUDY BARNES
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for State of Idaho
Residing at Rupert, Idaho.
Commission Expires: 02-12-2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of September, 2007, I served the foregoing AFFIDAVIT OF TRAVIS L. THOMPSON upon the following by the method indicated:

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__✓__ Hand Delivery
_____ Overnight Mail
_____ Facsimile
_____ Email

Travis L. Thompson

EXHIBIT "A"

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37.03.11 - Rules for Conjunctive Management of Surface and Ground Water Resources

IDAPA 37
TITLE 03
CHAPTER 11

37.03.11 - RULES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES

000. LEGAL AUTHORITY (RULE 0).

These rules are promulgated pursuant to Chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and Section 42-603, Idaho Code, which provides that the Director of the Department of Water Resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. These rules are also issued pursuant to Section 42-1805(8), Idaho Code, which provides the Director with authority to promulgate rules implementing or effectuating the powers and duties of the department. (10-7-94)

001. TITLE AND SCOPE (RULE 1).

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources." The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. (10-7-94)

002. WRITTEN INTERPRETATIONS (RULE 2).

In accordance with Section 67-5201(19)(b)(iv), Idaho Code, the Department of Water Resources does not have written statements that pertain to the interpretation of the rules of this chapter, or to the documentation of compliance with the rules of this chapter. (10-7-94)

003. ADMINISTRATIVE APPEALS (RULE 3).

Appeals may be taken pursuant to Section 42-1701A, Idaho Code, and the department's Rules of Procedure, IDAPA 37.01.01. (10-7-94)

004. SEVERABILITY (RULE 4).

The rules governing this chapter are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance is declared invalid, that invalidity does not affect the validity of any remaining portion of this chapter. (10-7-94)

005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).

Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law. (10-7-94)

006. -- 009. (RESERVED).

010. DEFINITIONS (RULE 10).

For the purposes of these rules, the following terms will be used as defined below. (10-7-94)

01. Area Having a Common Ground Water Supply. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code) (10-7-94)

02. Artificial Ground Water Recharge. A deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code, and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply. (10-7-94)

03. Conjunctive Management. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground

water supply. (10-7-94)

04. **Delivery Call**. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. (10-7-94)

05. **Department**. The Department of Water Resources created by Section 42-1701, Idaho Code. (10-7-94)

06. **Director**. The Director of the Department of Water Resources appointed as provided by Section 42-1801, Idaho Code, or an employee, hearing officer or other appointee of the Department who has been delegated to act for the Director as provided by Section 42-1701, Idaho Code. (10-7-94)

07. **Full Economic Development of Underground Water Resources**. The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42. (10-7-94)

08. **Futile Call**. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource. (10-7-94)

09. **Ground Water Management Area**. Any ground water basin or designated part thereof as designated by the Director pursuant to Section 42-233(b), Idaho Code. (10-7-94)

10. **Ground Water**. Water under the surface of the ground whatever may be the geological structure in which it is standing or moving as provided in Section 42-230(a), Idaho Code. (10-7-94)

11. **Holder of a Water Right**. The legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose. (10-7-94)

12. **Idaho Law**. The constitution, statutes, administrative rules and case law of Idaho. (10-7-94)

13. **Junior-Priority**. A water right priority date later in time than the priority date of other water rights being considered. (10-7-94)

14. **Material Injury**. Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42. (10-7-94)

15. **Mitigation Plan**. A document submitted by the holder(s) of a junior-priority ground water right and approved by the Director as provided in Rule 043 that identifies actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply. (10-7-94)

16. **Person**. Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. (10-7-94)

17. **Petitioner**. Person who asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule. (10-7-94)

18. **Reasonable Ground Water Pumping Level**. A level established by the Director pursuant to Sections 42-226, and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case-by-case basis, for the purpose of protecting the holders of senior-priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior-priority surface or ground water rights under Idaho law. (10-7-94)

19. Reasonably Anticipated Average Rate of Future Natural Recharge. The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change. (10-7-94)

20. Respondent. Persons against whom complaints or petitions are filed or about whom investigations are initiated. (10-7-94)

21. Senior-Priority. A water right priority date earlier in time than the priority dates of other water rights being considered. (10-7-94)

22. Surface Water. Rivers, streams, lakes and springs when flowing in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. (10-7-94)

23. Water District. An instrumentality of the state of Idaho created by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. (10-7-94)

24. Watermaster. A person elected and appointed as provided in Section 42-605, and Section 42-801, Idaho Code, to distribute water within a water district. (10-7-94)

25. Water Right. The legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law. (10-7-94)

011. -- 019. (RESERVED).

020. GENERAL STATEMENTS OF PURPOSE AND POLICIES FOR CONJUNCTIVE MANAGEMENT OF SURFACE AND GROUND WATER RESOURCES (RULE 20).

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. (10-7-94)

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. (10-7-94)

03. Reasonable Use of Surface and Ground Water. These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule. (10-7-94)

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. (10-7-94)

05. Exercise of Water Rights. These rules provide the basis for determining the reasonableness of the diversion and use of water by both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made. (10-7-94)

06. Areas Having a Common Ground Water Supply. These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code. (10-7-94)

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state. (10-7-94)

08. Reasonably Anticipated Average Rate of Future Natural Recharge. These rules provide for administration of the use of ground water resources to achieve the goal that withdrawals of ground water not exceed the reasonably anticipated average rate of future natural recharge. (Section 42-237a.g., Idaho Code) (10-7-94)

09. Saving of Defenses. Nothing in these rules shall affect or in any way limit any person's entitlement to assert any defense or claim based upon fact or law in any contested case or other proceeding. (10-7-94)

10. Wells as Alternate or Changed Points of Diversion for Water Rights from a Surface Water Source. Nothing in these rules shall prohibit any holder of a water right from a surface water source from seeking, pursuant to Idaho law, to change the point of diversion of the water to an inter-connected area having a common ground water supply. (10-7-94)

11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury. (10-7-94)

021. -- 029. (RESERVED).

030. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS OR WITHIN WATER DISTRICTS WHERE GROUND WATER REGULATION HAS NOT BEEN INCLUDED IN THE FUNCTIONS OF SUCH DISTRICTS OR WITHIN AREAS THAT HAVE NOT BEEN DESIGNATED GROUND WATER MANAGEMENT AREAS (RULE 30).

01. Delivery Call (Petition). When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230: (10-7-94)

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water. (10-7-94)

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records. (10-7-94)

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury. (10-7-94)

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated. (10-7-94)

02. **Contested Case**. The Department will consider the matter as a petition for contested case under the Department's Rules of Procedure, IDAPA 37.01.01. The petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 203. In addition to such direct service by petitioner, the Department will give such general notice by publication or news release as will advise ground water users within the petitioned area of the matter. (10-7-94)

03. **Informal Resolution**. The Department may initially consider the contested case for informal resolution under the provisions of Section 67-5241, Idaho Code, if doing so will expedite the case without prejudicing the interests of any party. (10-7-94)

04. **Petition for Modification of an Existing Water District**. In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

05. **Petition for Creation of a New Water District**. In the event the petition proposes regulation of ground water rights from a ground water source or conjunctively with surface water rights within an area having a common ground water supply which is not in an existing water district, and the water rights have been adjudicated, the Department may consider such to be a petition for creation of a new water district and notice of proposed creation of a water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

06. **Petition for Designation of a Ground Water Management Area**. In the event the petition proposes regulation of ground water rights from an area having a common ground water supply within which the water rights have not been adjudicated, the Department may consider such to be a petition for designation of a ground water management area pursuant to Section 42-233(b), Idaho Code. The Department will proceed to consider the matter under the Department's Rules of Procedure. (10-7-94)

07. **Order**. Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district; (10-7-94)

d. Incorporate an area having a common ground water supply into an organized water district following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district; (10-7-94)

e. Create a new water district following the procedures of Section 42-604, Idaho Code, provided that

the water rights to be included in the new water district have been adjudicated; (10-7-94)

f. Determine the need for an adjudication of the priorities and permissible rates and volumes of diversion and consumptive use under the surface and ground water rights of the petitioner and respondents and initiate such adjudication pursuant to Section 42-1406, Idaho Code; (10-7-94)

g. By summary order as provided in Section 42-237 a.g., Idaho Code, prohibit or limit the withdrawal of water from any well during any period it is determined that water to fill any water right is not there available without causing ground water levels to be drawn below the reasonable ground water pumping level, or would affect the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. The Director will take into consideration the existence of any approved mitigation plan before issuing any order prohibiting or limiting withdrawal of water from any well; or (10-7-94)

h. Designate a ground water management area under the provisions of Section 42-233(b), Idaho Code, if it appears that administration of the diversion and use of water from an area having a common ground water supply is required because the ground water supply is insufficient to meet the demands of water rights or the diversion and use of water is at a rate beyond the reasonably anticipated average rate of future natural recharge and modification of an existing water district or creation of a new water district cannot be readily accomplished due to the need to first obtain an adjudication of the water rights. (10-7-94)

08. Orders for Interim Administration. For the purposes of Rule Subsections 030.07.d. and 030.07.e., an outstanding order for interim administration of water rights issued by the court pursuant to Section 42-1417, Idaho Code, in a general adjudication proceeding shall be considered as an adjudication of the water rights involved. (10-7-94)

09. Administration Pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40. (10-7-94)

10. Administration Pursuant to Rule 41. Upon the designation of a ground water management area, the diversion and use of water within such area shall be administered in accordance with the priorities of the various water rights as provided in Rule 41. (10-7-94)

031. DETERMINING AREAS HAVING A COMMON GROUND WATER SUPPLY (RULE 31).

01. Director to Consider Information. The Director will consider all available data and information that describes the relationship between ground water and surface water in making a finding of an area of common ground water supply. (10-7-94)

02. Kinds of Information. The information considered may include, but is not limited to, any or all of the following: (10-7-94)

a. Water level measurements, studies, reports, computer simulations, pumping tests, hydrographs of stream flow and ground water levels and other such data; and (10-7-94)

b. The testimony and opinion of expert witnesses at a hearing on a petition for expansion of a water district or organization of a new water district or designation of a ground water management area. (10-7-94)

03. Criteria for Findings. A ground water source will be determined to be an area having a common ground water supply if: (10-7-94)

a. The ground water source supplies water to or receives water from a surface water source; or (10-7-94)

b. Diversion and use of water from the ground water source will cause water to move from the surface

water source to the ground water source. (10-7-94)

c. Diversion and use of water from the ground water source has an impact upon the ground water supply available to other persons who divert and use water from the same ground water source. (10-7-94)

04. **Reasonably Anticipated Average Rate of Future Natural Recharge**. The Director will estimate the reasonably anticipated average rate of future natural recharge for an area having a common ground water supply. Such estimates will be made and updated periodically as new data and information are available and conditions of diversion and use change. (10-7-94)

05. **Findings**. The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07. (10-7-94)

032. -- 039. (RESERVED).

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).

01. **Responding to a Delivery Call**. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall: (10-7-94)

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or (10-7-94)

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director. (10-7-94)

02. **Regulation of Uses of Water by Watermaster**. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in Section 42-604, Idaho Code, and under the following procedures: (10-7-94)

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source. (10-7-94)

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director. (10-7-94)

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority. (10-7-94)

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by Section 42-606, Idaho Code. (10-7-94)

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated. (10-7-94)

03. **Reasonable Exercise of Rights**. In determining whether diversion and use of water under rights will be regulated under Rule Subsection 040.01.a. or 040.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste. (10-7-94)

04. **Actions of the Watermaster Under a Mitigation Plan**. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan. (10-7-94)

05. **Curtailment of Use Where Diversions Not in Accord With Mitigation Plan or Mitigation Plan Is Not Effective**. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights. (10-7-94)

06. **Collection of Assessments Within Water District**. Where a mitigation plan has been approved, the watermaster of the water district shall include the costs of administration of the plan within the proposed annual operation budget of the district; and, upon approval by the water users at the annual water district meeting, the water district shall provide for the collection of assessment of ground water users as provided by the plan, collect the assessments and expend funds for the operation of the plan; and the watermaster shall maintain records of the volumes of water or other compensation made available by the plan and the disposition of such water or other compensation. (10-7-94)

041. ADMINISTRATION OF DIVERSION AND USE OF WATER WITHIN A GROUND WATER MANAGEMENT AREA (RULE 41).

01. **Responding to a Delivery Call**. When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows: (10-7-94)

a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient. (10-7-94)

b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area. (10-7-94)

02. **Order**. Following the hearing, the Director may take any or all of the following actions: (10-7-94)

a. Deny the petition in whole or in part; (10-7-94)

b. Grant the petition in whole or in part or upon conditions; (10-7-94)

c. Find that the water supply of the ground water management area is insufficient to meet the

demands of water rights within all or portions of the ground water management area and order water right holders on a time priority basis to cease or reduce withdrawal of water, provided that the Director shall consider the expected benefits of an approved mitigation plan in making such finding. (10-7-94)

d. Require the installation of measuring devices and the reporting of water diversions pursuant to Section 42-701, Idaho Code. (10-7-94)

03. Date and Effect of Order. Any order to cease or reduce withdrawal of water will be issued prior to September 1 and shall be effective for the growing season during the year following the date the order is given and until such order is revoked or modified by further order of the Director. (10-7-94)

04. Preparation of Water Right Priority Schedule. For the purposes of the Order provided in Rule Subsections 041.02 and 041.03, the Director will utilize all available water right records, claims, permits, licenses and decrees to prepare a water right priority schedule. (10-7-94)

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

a. The amount of water available in the source from which the water right is diverted. (10-7-94)

b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)

d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7-94)

e. The amount of water being diverted and used compared to the water rights. (10-7-94)

f. The existence of water measuring and recording devices. (10-7-94)

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority. (10-7-94)

02. Delivery Call for Curtailment of Pumping. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan. (10-7-94)

043. MITIGATION PLANS (RULE 43).

01. Submission of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

a. The name and mailing address of the person or persons submitting the plan. (10-7-94)

b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)

c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)

d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice and Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors to Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)

b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)

c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multi-season accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)

d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)

e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

f. Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)

g. Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)

h. The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)

i. Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)

j. Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)

k. Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)

l. Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)

m. Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)

n. A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)

o. Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

044. -- 049. (RESERVED).

050. AREAS DETERMINED TO HAVE A COMMON GROUND WATER SUPPLY (RULE 50).

01. Eastern Snake Plain Aquifer. The area of coverage of this rule is the aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. (10-7-94)

a. The Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River. (10-7-94)

b. The Eastern Snake Plain Aquifer is found to be an area having a common ground water supply. (10-7-94)

c. The reasonably anticipated average rate of future natural recharge of the Eastern Snake Plain Aquifer will be estimated in any order issued pursuant to Rule 30. (10-7-94)

d. The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated, or will be designated a ground water management area. (10-7-94)

051. -- 999. (RESERVED).

Subject Index

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EXHIBIT "B"

Nos. 33249/33311/33399

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN FALLS RESERVOIR DISTRICT #2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY,

Plaintiffs-Respondents-Cross-Appellants, and

RANGEN, INC, CLEAR SPRINGS FOODS, INC., THOUSAND SPRINGS WATER USERS ASSOCIATION, and IDAHO POWER COMPANY,

Interveners-Respondents-Cross-Appellants,

v.

IDAHO DEPARTMENT OF WATER RESOURCES and KARL DREHER, its Director,

Defendants-Appellants-Cross-Respondents, and

IDAHO GROUND WATER APPROPRIATORS, INC.,

Intervener-Appellant-Cross-Respondents.

DEFENDANTS-APPELLANTS' OPENING BRIEF ON APPEAL

On appeal from the District Court of the 5th Judicial District of the State of Idaho, in and for the County of Gooding
Honorable Barry Wood, District Judge

Counsels for Defendants-Appellants, State of Idaho **LAWRENCE G. WASDEN**, Attorney General **CLIVE J. STRONG**, ISB #2207 Deputy Attorney General Chief, Natural Resources Division **PHILLIP J. RASSIER,** ISB #1750 Deputy Attorney General Idaho Department of Water Resources	**MICHAEL C. ORR**, ISB #6720 Deputy Attorney General Natural Resources Division P.O. Box 83720 Boise, ID 83720-0010 Telephone: (208) 334-4154 *(See Service Page for Remaining Counsel)*

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STATEMENT OF THE CASE

I. THE NATURE OF THE CASE.

This case presents a facial constitutional challenge to the Rules for Conjunctive Management of Surface and Ground Water Resources (the "CM Rules" or "Rules").[1] Appellant Idaho Department of Water Resources ("IDWR" or "the Department") promulgated the Rules to integrate the administration of surface water rights and ground water rights under the prior appropriation doctrine as established by Idaho law. IDWR takes this appeal from a summary judgment ruling declaring the Rules facially unconstitutional based on the perceived absence of certain "procedural components" of the prior appropriation doctrine from the Rules.

The question of such an absence was not raised, briefed or argued in the district court. Rather, the district court proceedings focused on the Plaintiffs-Respondents' ("Plaintffs") theory

[1] IDAPA 37.03.11.000 – 37.03.11.050.

that Idaho law requires "strict priority" administration of water rights. The Plaintiffs argued that Idaho law requires immediate and automatic curtailment of junior ground water rights any time a senior surface water right holder's water supply dips below the decreed quantity, without regard to the extent of hydraulic interconnection between the surface and ground water supplies, the effect of junior ground water diversions on the senior right, the extent of the senior's current needs, or any other relevant principle of the prior appropriation doctrine as established by Idaho law. The Plaintiffs argued that the Rules permit a "re-adjudication" of decreed rights because they recognize such substantive tenets of the prior appropriation doctrine rather than requiring administration based solely on priority date and decreed quantity.

The district court correctly rejected these arguments and held that the substantive factors and policies recognized in the Rules are consistent with the prior appropriation doctrine and can be applied constitutionally. The district court went on, however, to hold the Rules facially unconstitutional on an entirely different basis—the perceived absence of "procedural components" of the prior appropriation doctrine the district court viewed as constitutionally mandated. The questions presented by this appeal therefore differ in significant respects from the questions actually litigated in the district court.

This is particularly true in that the district court focused on the application of the Rules to the Plaintiffs rather than the Rules' facial validity, even though the administrative record was incomplete and a factual record was never properly developed in court. The district court interpreted Idaho Code § 67-5278 as making the Director's actual and "threatened" application of the Rules to the Plaintiffs the controlling inquiry, and as authorizing judicial review of an

ongoing administrative proceeding in a "facial" challenge. Likewise, the district court's holding that the "reasonable carryover" provision is facially unconstitutional was based on premature judicial review, and on the district court's unprecedented ruling that storage rights in Idaho include an entitlement to retain a full storage allotment through the end of an irrigation season, *while calling for the curtailment of junior rights, regardless of whether a full storage allotment is* necessary for the authorized beneficial use in either the current season or the next season.

This case presents questions that strike at the core of the Idaho Administrative Procedure Act and the prior appropriation doctrine, and poses significant constitutional law questions. As discussed herein, the district court erred in several respects that warrant reversal.

II. THE PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT.

The Plaintiffs filed a declaratory judgment complaint under Idaho Code §§ 67-5278 and 10-1201—10-1217 on August 15, 2005, seeking declarations that the CM Rules are being unconstitutionally applied to the Plaintiffs' request for administration of junior ground water rights ("delivery call"), and are void on their face.[2] Rangen, Inc., Clear Springs Foods, Inc., the Thousand Springs Water Users Association, and Idaho Power Company intervened on the Plaintiffs' side of the case, and the City of Pocatello and the Idaho Ground Water Appropriators, Inc., intervened on the Appellants-Defendants' ("Defendants") side.

The Defendants moved to dismiss the Complaint under the doctrines of primary jurisdiction and failure to exhaust administrative remedies,[3] but the Plaintiffs and the like-aligned Interveners (collectively, "Plaintiffs") moved for summary judgment before the district court

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2 R. Vol. 1, pp.1, 11.

3 R. Vol. 1, pp.150-51.

ruled on the motion to dismiss.[4] The district court denied the motion to dismiss but limited summary judgment to the facial challenge alone.[5] After the Defendants filed a brief opposing summary judgment, the district court ordered that the facial challenge would be decided on the basis of the "threatened application" of the Rules to the Plaintiffs' delivery call.[6]

The district court allowed the parties to file supplemental briefing under the "threatened application" standard,[7] and heard summary judgment arguments on April 11, 2006.[8] The district court entered a 126-page Order on Plaintiffs' Motion for Summary Judgment ("Order") on June 2, 2006,[9] holding that the substantive factors and policies of the Rules can be applied constitutionally and are consistent with the prior appropriation doctrine,[10] but that the Rules are facially unconstitutional as a whole due to the perceived absence of certain "procedural components" of the prior appropriation doctrine.[11] The district court also held that the "reasonable carryover" provision regarding year-end carryover in reservoir storage was facially unconstitutional on grounds of its "threatened application" to the Plaintiffs, and under this Court's decision in *Washington County Irrigation District v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935).[12] The district court entered a corresponding Judgment Granting Partial Summary

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4 R. Vol. IV, pp. 736-37; R. Vol. V, pp. 1095-96, 1229-30; R. Vol. VI, pp. 1266-67.
5 R. Vol. VI, pp. 1312, 1314; Tr. Vol. I, p. 132-33, 135; R. Vol. VIII, p. 1813.
6 R. Vol. VIII, pp. 1814-15.
7 R. Vol. VIII, pp. 2059-86; R. Vol. IX, pp. 2173-2223; R. Vol . IX, pp. 2248-2277.
8 T. Vol. I, p. 182.
9 The Order is located at R. Vol. X, pp. 2337-2477. Subsequent citations to the Order will consist of the word "Order" and the corresponding page number(s) rather than a record citation.
10 Order at 3, 83-90.
11 Order at 3, 83-83, 90-98.
12 Order at 109-17.

Judgment ("Judgment") on June 30, 2006,[13] and certified the Judgment under Rule 54(b) on July 11, 2006.[14] The Defendants filed a Notice of Appeal on the same day.[15]

III. STATEMENT OF FACTS.

A. The Conjunctive Management Rules.

IDWR promulgated the CM Rules in 1994 for use in responding to delivery calls by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights diverting from interconnected sources.[16] Prior to the 1992 amendments to Idaho Code §§ 42-602 and 42-603 that provided for the inclusion of ground water rights in water districts,[17] ground water rights and surface water rights had been administered as separate water sources in Idaho. The CM Rules are the first formal rulemaking attempt to establish a comprehensive framework for joint administration of rights in interconnected surface water and ground water sources. The Rules provide procedures tailored to water districts, ground water management areas, and areas outside of such administrative structures.[18]

B. The Plaintiffs' Water Delivery Call.[19]

The Plaintiffs hold surface water rights in the Snake River or springs in the Snake River

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13 R. Vol. X., pp. 2502-05.

14 Tr. Vol. I, pp. 359, 371-72.

15 R. Vol. X, p. 2516.

16 IDAPA 37.03.11.001. Subsequent citations to provisions of the CM Rules will consist of the term "CM Rule" or "Rule" and the corresponding rule number rather than an IDAPA citation. For instance, IDAPA 37.03.11.20.02 will be cited as "CM Rule 20.02" or "Rule 20.02."

17 1992 Idaho Session Laws ch. 339 §§ 2, 4, p. 1015-16.

18 CM Rules 30, 40, 41.

19 The Defendants discuss the Plaintiffs' delivery call and the Director's response thereto solely for purposes of supporting Defendants' assignments of error in this appeal. The Defendants reserve all objections to the district court's review of the Plaintiffs' delivery call proceedings and its consideration and resolution of disputed factual issues in this case.

canyon, and several also hold storage contracts with the United States Bureau of Reclamation ("USBR") for space in the Upper Snake River reservoirs.[20] In January 2005, the five named Plaintiffs and two other entities[21] submitted a delivery call to the Director seeking preemptory curtailment of junior ground water rights during the 2005 irrigation season.[22] The Director responded with an order on February 14, 2005, that, among other things, concluded that the Plaintiffs' water supplies likely would be injured by junior ground water diversions during the 2005 season.[23] The Director ordered that he would determine the reasonably likely extent of the projected injury after the USBR and the United States Army Corps of Engineers released their joint forecast for inflow to the Upper Snake River Basin for April 1 through July 1, 2005.[24]

The Department received the joint inflow forecast on April 7, 2005, and the Director issued an order for relief ("Relief Order") less than two weeks later, on April 19, 2005.[25] The Relief Order determined the water shortages and shortfalls the Plaintiffs were reasonably likely to suffer in 2005, and the amount of additional water that would accrue to the Plaintiffs' supplies under various scenarios for the curtailment of junior ground water rights.[26] The Relief Order identified the junior ground water rights subject to administration pursuant to the Plaintiffs' delivery call, and ordered these juniors to provide "replacement" water in sufficient quantities to

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20 R. Vol. I, pp. 168-73. The underlying storage rights for these reservoirs are claimed by United States Bureau of Reclamation and have not yet been adjudicated in the SRBA.

21 The two other entities were Milner Irrigation District and North Side Canal Company. Collectively, the seven entities are known as the "Surface Water Coalition" or, in some portions of the record, "SWC."

22 R. Vol. III, pp. 599-650.

23 R. Vol. IX, p. 2244, ¶ 5; R. Vol. X, p. 2550, L. 5.

24 The February 14 order also granted IGWA's request to intervene in the administrative matter.

25 Appendix A is copy of the Relief Order. Subsequent citations to the Relief Order will consist of the term "Relief Order" and the corresponding page and/or paragraphs numbers. The Director issued an amended Relief Order on May 2, 2005. The amendments were limited and are not germane to the issues presented in this appeal

26 Relief Order at 24-29.

offset the depletions in the Plaintiffs' water supplies caused by the junior diversions, at the time and in the place required under the Plaintiffs' water rights, or face immediate curtailment.[27]

The Director expedited the Relief Order by making it effective immediately as an emergency order under Idaho Code § 67-5247,[28] and by issuing it before a hearing. Pursuant to Idaho Code § 42-1701A(3), the Relief Order provided that aggrieved parties were entitled to an administrative hearing on the order if requested within fifteen days, but otherwise the order would become final.[29] The Plaintiffs and IGWA requested an administrative hearing, but the Plaintiffs filed this action before the date set for the hearing and subsequently requested stays or continuances in the hearing schedule, either on their own behalf or jointly with other parties.[30] This administrative challenge to the Relief Order remains pending.

C. The Declaratory Judgment Action.

The Complaint focused primarily on the allegedly unconstitutional application of the Rules to the Plaintiffs' delivery call and sought corresponding declaratory relief.[31] The Complaint also sought a declaration that the Rules are "void on their face."[32] The Plaintiffs' summary judgment motion relied on extensive affidavits pertaining to the Plaintiffs' delivery call,[33] and briefing that conflated the as-applied and facial claims and arguments.[34] The

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27 *Id.* at 43-46.

28 *Id.* at 46 ¶ 14.

29 *Id.* at 46 ¶ 14.

30 R. Vol. IX, p. 2244, ¶ 3 ("Illustrative Timeline" at 2-3); R. Vol. X, p. 2550, L. 5. Appendix B is a copy of the "Illustrative Timeline" for the administrative proceedings on the delivery call.

31 *See generally* R. Vol. I, pp. 5-10 ¶¶ 13, 14(A)-(B), 15, 17, 18 (Count I); *id.* at 10 ¶¶ 1-2 (Count II); *id.*, p. 11 (prayer for relief). The petitions to intervene made similar allegations and requests for relief. R. Vol. I, pp. 85-92; R. Vol. II, pp. 292-96.

32 R. Vol. I, pp. 11, 91; R. Vol. II, pp. 296.

33 R. Vol. IV, pp. 744-983; R. Vol. V, pp. 1100-1189; R. Vol. V, pp. 1257-65; R. Vol. X, p. 2550, L. 1; R.

Defendants argued that the case should be dismissed as an improper attempt to bypass the administrative hearing.[35] The district court found that the Plaintiffs had failed to exhaust their administrative remedies, but nonetheless declined to dismiss any claims.[36]

The Defendants sought clarification that summary judgment would be limited to the facial claim and requested that the Plaintiffs re-brief summary judgment on the facial claim alone.[37] While the district court affirmed that the summary judgment hearing was confined to the facial challenge,[38] it declined to exclude the factual materials or order re-briefing.[39]

In their brief in opposition to summary judgment, the Defendants argued that the Plaintiffs had to show the Rules incapable of constitutional application under any circumstances for purposes of a facial challenge, and could not rely on allegations regarding the application of the Rules to the delivery call.[40] Shortly thereafter, the district court *sua sponte* ordered that under Idaho Code § 67-5278, the actual and "threatened application" of the CM Rules to the Plaintiffs' delivery call was "part and parcel" of the facial challenge.[41] The district court explained that under this standard, "the director's threatened application of the rule, or his application to date, as applied to the rules, is subject to review."[42]

Based on the district court's "threatened application" ruling, the Plaintiffs pressed their

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Vol. VI, pp. 1271-75; *see also* R. Vol. III, pp. 591-725.

34 *See, e.g.*, R. Vol. V., pp. 988-89, 999-1002, 1024-30, 1032-35, 1191-92, 1194-95, 1198, 1201-08, 1234-35, 1238, 1244-51; R. Vol. V, pp. 1277, 1280-81.

35 R. Vol. II., p. 260.

36 R. Vol. VI, pp. 132, 1314.

37 R. Vol. VI, 1340-45.

38 Tr. Vol. I, p. 132-33, 135; R. Vol. VIII, p. 1813; Order at 23.

39 Tr. Vol. I, pp. 135.

40 R. Vol. VII, pp. 1582, 1534-39.

41 R. Vol. VIII, pp. 1814-15; R. Vol. X, pp. 2337, 2360.

42 Tr. Vol. I, p. 316.

as-applied claims and sought judicial review under the guise of a facial challenge.[43] The district court reviewed the Director's orders on the delivery call, drew factual inferences and conclusions on disputed issues of material fact regarding the application of the Rules to the Plaintiffs, including sharply disputed issues that remained pending before the Director, and relied on these conclusions and inferences in holding the CM Rules facially invalid.[44]

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in holding that the CM Rules are facially unconstitutional due to the perceived absence of certain "procedural components";

2. Whether the Rules' application of well-established prior appropriation principles to conjunctive administration of water rights constitutes a facial "re-adjudication" or "taking" of decreed rights;

3. Whether the district court erred in finding the "reasonable carryover" provision of the Rules facially unconstitutional;

4. Whether the district court erred in ruling that the Director acted outside his statutory authority in promulgating the CM Rules; and

5. Whether the district court improperly circumvented the exhaustion requirement of the Idaho Administrative Procedure Act.

ARGUMENT

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[43] *See, e.g.*, R. Vol. V. p. 1192 (arguing that because the Rules "allow the Department to diminish and limit Clear Springs' vested property rights, its decreed water rights, the Rules are unconstitutional on their face"); Tr. Vol. I, p. 324 ("I'm showing that's how he applied the rules, and that is not a proper application. He believes the rules allow him to do that. And therefore, they're unconstitutional"); *see also* R. Vol. V, pp. 999-1000, 1001-02, 1023-30, 1032, 1034-35, 1194-95, 1201-08, 1210-11, 1215, 1217-18, 1245, 1248; R. Vol. VI, pp. 1280-81; R. Vol. VIII, pp. 1898-99, 1905-06, 1909, 1912 n.16, 1913-15, 1917, 1938, 1947, 1969-72, 1974, 1984; R. Vol. IX, pp. 2252-53 n.4, 2262, 2265 n.18, 2269-70, 2281, 2285; Tr. Vol. I, pp. 165, 175, 186, 194-95, 203-07, 210-11, 218-19, 222-23, 232, 304, 307, 323-24, 331-32.

[44] *See, e.g.*, Order at 25 ("this Court will also utilize the underlying facts in this case to determine whether the CMR's are invalid, and illustrate how the CMR's are being applied"); *id.* at n.5 ("In order to help determine whether the CMR's attempt to give the Director this authority [to re-adjudicate water rights], this Court will look at the facts of this case to determine if the Director did or threaten[ed] to do this"); *see also id.* at 90-97, 109-17.

I. SUMMARY OF ARGUMENT

The district court correctly rejected the Plaintiffs' theory of strict priority administration and determined that the substantive elements of the Rules can be applied constitutionally and are consistent with the prior appropriation doctrine under the familiar standards that govern facial challenges in Idaho. The district court erred by going further and declaring the Rules unconstitutional due to the perceived absence of certain "procedural components," a claim that had not been raised, briefed or argued.

This holding was flawed as a matter of law because it erroneously read into the Idaho Constitution and this Court's cases a new requirement that delivery calls must be administratively litigated as mini-lawsuits with the Director acting as a referee or special master rather than as an executive officer. This holding ignored the framework for water rights administration and judicial review established by the Legislature, usurped the Director's statutory authority, and would return Idaho to the system of administration-by-lawsuit the Legislature has rejected. Further, there is no requirement that the Rules expressly recite "procedural components," because they are provided by existing law and are explicitly incorporated into the Rules by reference.

The district court relied on improper presumptions and speculation rather than the plain language of the Rules in holding that they permit the administrative "re-adjudication" or "takings" of decreed rights. Moreover, while the district court recognized the inherent factual and legal complexity of conjunctively administering surface and ground water rights under the prior appropriation doctrine as established by Idaho law, it failed to recognize that IDWR is

required to consider more than just decreed quantity and priority date in such administration.

The rule that "first in time is first in right" is central to the administration of water rights in hydraulically connected sources, as the Rules explicitly recognize. This tenet is not self-executing, however, and before it can be applied there must first be a determination of under what facts or circumstances priority controls. This is no simple task, as Douglas L. Grant, former professor of law at the University of Idaho, discusses in a 1987 law review article. "The immediate cause of the complexity [of managing hydrologically connected surface and ground water] is that surface water and groundwater differ physically. Groundwater moves slower and more diffusely, and its movement is less readily ascertainable." Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 63 (1987).[45] This character of ground water means that curtailment may or may not benefit the senior, depending on the circumstances. The Rules provide the necessary administrative framework for integrating the rule that "first in time is first in right" with the other legal tenets of the prior appropriation doctrine that seek to promote optimum utilization of the resource.

Factual determinations made under the Rules do not constitute a "re-adjudication" because the SRBA district court's decrees do not adjudicate many of the complex factual issues necessary for the conjunctive administration of individual surface and ground water rights in accordance with Idaho law. Rather, IDWR is charged with making the factual determinations necessary to support conjunctive administration of individual water rights. In addition, the

[45] Appendix D is a copy of this article.

Director is statutorily obligated to give effect to all relevant principles of the prior appropriation doctrine in responding to a delivery call, and doing so does not amount to a re-adjudication or taking, but rather is consistent with the inherent nature and scope of an Idaho water right.

In holding the "reasonable carryover" provision unconstitutional, the district court created a new, bright line rule that a storage right includes an entitlement to retain a full reservoir storage allotment through the end of the irrigation season regardless of whether the full amount will be necessary to satisfy the beneficial use for which the water is stored—and to call for curtailment of any vested junior rights if their exercise would affect the ability to maintain a full storage allotment. This holding is contrary to this Court's cases and the historic exercise of storage rights in Idaho. It would also allow water to be wasted while junior rights are curtailed, and would surrender public control of Idaho's public water resources.

The district court circumvented the exhaustion requirement by misinterpreting Idaho Code § 67-5278 as authorizing judicial review of an ongoing administrative proceeding for purposes of a facial challenge. This allowed the Plaintiffs to use this case as a vehicle to pursue their as-applied claims while simultaneously seeking delay of those proceedings. The district court resolved disputed issues of material fact regarding those claims at summary judgment in a declaratory judgment action—including factual issues that are statutorily entrusted to the Director in the first instance, and that remain pending before him. If not reversed, the district court's decision will provide a basis and incentive for opting out of an ongoing administrative proceeding at any time by filing a lawsuit alleging the applicable administrative rules are invalid.

II. STANDARD OF REVIEW.

The facial constitutionality of a statute or an administrative rule is a question of law over which this Court exercises free review. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 540, 96 P.3d 637, 641 (2004), *cert. denied*, 543 U.S. 1146 (2005); *Rhodes v. Indus. Comm'n*, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993). There is a strong presumption of validity, and the challenger must carry the heavy burden of showing that there is no set of circumstances under which the statute or rule is valid. *Moon*, 140 Idaho at 540, 545, 96 P.3d at 641, 646. The Court is obligated to seek a constitutional interpretation of the challenged statute or rule. *Moon*, 140 Idaho at 540, 96 P.3d at 641.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE RULES ARE FACIALLY UNCONSTITUTIONAL DUE TO THE PERCEIVED ABSENCE OF PROCEDURAL COMPONENTS OF THE PRIOR APPRORPRIATION DOCTRINE.

A. The District Court Correctly Held That The Rules Can Be Applied Constitutionally And Are Consistent With The Prior Appropriation Doctrine As Established By Idaho Law.

The Plaintiffs claimed in the district court that the CM Rules are facially unconstitutional because the substantive factors and policies recognized in the Rules are repugnant to the prior appropriation doctrine and are an attempt to create "new law." *See, e.g.*, R. Vol. V, pp. 996-1008, 1010-12, 1016-22. The Plaintiffs asserted that Idaho water distribution statutes are "self-executing" and require the Director to constantly monitor all water supplies and automatically curtail junior water rights holders whenever any senior water right holder's supply dips below the decreed maximum quantity. *See e.g.*, R. Vol. VIII, pp. 1891-92, 1938-39. In short, the Plaintiffs argued that Idaho law requires rote and mechanical "strict priority" administration solely on the basis of priority date and decreed quantity.

The district court correctly rejected this challenge. It held that Idaho's water distribution statutes are not self-executing, Order at 98, and applied "a presumption of constitutionality" and the facial challenge standard that "if the provision can be construed in a manner which is constitutional, the provision will withstand the challenge." Order at 83. The district court held that the "Plaintiffs did not meet this standard" and that the challenged portions of the Rules "can be construed consistent with the prior appropriation doctrine." Order at 84. The district court held that the substantive factors and policies of the Rules "survive a facial challenge." *Id.* at 90.

This conclusion was well grounded in Idaho law, because Idaho water rights are "administered according to the prior appropriation doctrine as opposed to strict priority." *In re SRBA, Subcase No. 92-00021-37 SW (Surface Water)*, Order Granting Motion for Interim Administration for Basin 37 Part 1 Surface Water (5th Jud. Dist., Dec. 13, 2005) at 6; *see also In re SRBA, Subcase 91-00005 (Basin-Wide Issue 5)* Order on Cross-Motions for Summary Judgment; Order on Motion to Strike Affidavits (5th Jud. Dist., July 2, 2001) ("Order on Basin-Wide Issue 5") at 30 ("The prior appropriation doctrine as developed in Idaho does not require that water rights sharing a given source be administered according to strict priority. The prior appropriation doctrine also recognizes various principles that protect junior water rights which should be incorporated into the administration of water rights").[46] Indeed, the SRBA district court has recognized that its decrees do not make all factual determinations necessary for conjunctive administration of surface and ground water rights:

IDWR is charged with the duty of administering water rights in accordance with

[46] Copies of these two SRBA district court orders are included herein at Appendices E and F.

> the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree. . . . The partial decree need not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated.

Order on Basin-Wide Issue 5 at 19.

Moreover, Idaho water rights are limited to the amount necessary to fulfill the authorized beneficial use, "regardless of the amount of [the] decreed right." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.5, 546 P.2d 382, 390 n.5 (1976) Water rights must also be exercised "within reasonable limits" and "with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120-21 (1912) (internal quotation marks and citation omitted).

While the Plaintiffs relied on the remark in *A & B Irrigation District v. Idaho Conservation League* that the Rules "do not appear to deal with the rights on the basis of 'prior appropriation,'" 131 Idaho 411, 422, 958 P.2d 568, 579 (1997), in arguing that the substantive factors and policies of the Rules are contrary to Idaho law, the district court rejected this argument without mentioning *A & B*. This was appropriate because *A & B* is not controlling, or even helpful, in evaluating the Rules' constitutionality under the applicable legal standards.[47]

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[47] The qualified remark in *A & B* was not based on a constitutional analysis of the Rules and was peripheral to the issue before the Court, which was whether a general provision regarding conjunctive management should be included in the partial decrees for Basins 34, 36 and 57. *Id.* at 421, 958 P.2d at 578. It should also be noted that, contrary to what the *A & B* remark appears to suggest, the Rules expressly recite, recognize or implement the rule of senior priority in multiple provisions. *See, e.g.*, Rules 000, 001, 10.07, 10.15, 10.18, 20.02, 20.04, 30.07(f)-(g), 30.09, 30.10, 40.01(a), 40.02, 40.02(a), 40.02(e), 40.05, 41.01, 41.02(c), 41.04, 43.03, 43.03(k).

Rather, the district court correctly looked to the plain language of the Rules and methodically rejected each of the Plaintiffs' challenges to the substantive factors and policies of the Rules, concluding that concepts such as ongoing beneficial use, "material injury," the need for a delivery call, reasonableness of diversion and use, and allowing for the provision of replacement or mitigation water in lieu of curtailment in appropriate circumstances, are constitutional and consistent with the prior appropriation doctrine as established by Idaho law. *See* Order at 83-89 ("The Court disagrees that each of the above stated concepts or factors considered when responding to a delivery call are on their face contrary to the prior appropriation doctrine and therefore unconstitutional on their face"); *id.* at 86 ("Accordingly, at least on its face, the integration of this policy [as set out in Rule 20.03] is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine"); *id.* at 88 ("On this basis the Court does not find the concept of '*material injury*' to be facially inconsistent with the prior appropriation doctrine. The concept of 'reasonableness of diversion is also a tenet of the prior appropriation doctrine. . . . There is a 'reasonableness' limitation imposed on the appropriation") (italics in original); *id.* at 89 ("The concept of being able to compel a senior to modify or change his point of diversion under appropriate circumstances is also consistent with the prior appropriation doctrine"); *id.* at 90 ("the principles are generally consistent with the prior appropriation doctrine. This same reasoning applies to the ability of the Director through the CMR's to require replacement water in lieu of hydraulically connected surface water diverted under the senior right; so long as no injury occurs to the senior . . . this replacement reasoning is

also consistent with the nature of a water right").

These holdings reflect the fact that the only "new law" in this case was that advocated by the Plaintiffs – strict priority administration, an extreme and simplistic policy that is foreign to the prior appropriation doctrine as established by Idaho law. The Rules' substantive elements, on the other hand, are well established in Idaho law. This should have been the end of the district court's inquiry under the controlling legal standards. The district court erred, however, by going further and finding the Rules facially defective on grounds that had not been raised: the perceived absence of "procedural components" of the prior appropriation doctrine.

B. The District Court Erred In Holding That Seniors Are Entitled To A Specific Administrative Procedure In Response To A Delivery Call.

The district court held that the Rules are facially unconstitutional because of the perceived absence of certain "procedural components" of the prior appropriation doctrine: a presumption of injury to a senior, an allocation of the burdens of proof, appropriate evidentiary standards, "objective standards" for applying the substantive factors and policies of the Rules, a workable procedural framework for processing a delivery call within a growing season, and the giving of proper legal effect to a partial decree. Order at 3, 84, 90-91, 94-98.

The significance of this perceived absence lay in the district court's view that there is a specific, constitutionally mandated procedure the Director must follow in responding to a delivery call. The district court held that the "procedural components" are "incorporeal property rights," Order at 76, that require the Director to follow a lawsuit-like procedure in responding to a delivery call. *See* Order at 98-103 (describing the delivery call response procedure).

These holdings were incorrect as a matter of law because "no one has a vested right in any given mode of procedure." *State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604, 610 (1975) (internal quotation marks and citation omitted). Nothing in the Idaho Constitution or the Idaho Code requires the Director to use the specific process or procedure the district court outlined in responding to delivery calls. Even the cases from which the district court drew the "procedural components" were not "delivery call" cases in the administrative sense, but rather private lawsuits between individual appropriators that had nothing to do with administrative procedures. *See* Order at 77-78 (discussing *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908)). These cases did not hold that the Director must follow a specific procedure when responding to a delivery call, and this Court has not so extended them.

The district court erroneously assumed that delivery calls must be handled as mini-lawsuits with the Director acting as a referee or special master presiding over the litigation, *see generally* Order at 98-103, rather than as an officer of the executive branch charged with implementing and administering substantive Idaho law. This reasoning subverts the water rights administration scheme devised by the Legislature, which replaced the practice of administration-by-lawsuit, and usurps the authority of Director, who is a water resources management professional and statutorily authorized to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law. *See, e.g.*, Idaho Code §§ 42-1701(1)-(2), 42-602, 42-603, 42-606, 42-607, 42-237a.

The Director is "the expert on the spot [with] the primary responsibility for a proper distribution of the waters of the state," not a special master or referee who resolves delivery calls

under judicial procedures developed for private water rights litigation. *Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (internal quotation marks and citations omitted).[48] Rather, an appropriator dissatisfied with the Director's decision—senior or junior—is entitled to judicial review of that decision under the standards and procedures established by the applicable provisions of the Idaho Administrative Procedure Act ("IDAPA"). Idaho Code § 67-5270. This is the framework the Legislature has provided for water rights administration and it protects the constitutional rights of water right holders.

C. The CM Rules Incorporate The "Procedural Components" By Reference.

The district court was also simply incorrect in holding that the "procedural components" are absent from the Rules. CM Rule 20.02 provides that the Rules acknowledge "all elements of the prior appropriation doctrine as established by Idaho law." The term "Idaho law" means "[t]he constitution, statutes administrative rules and case law of Idaho"—the same sources from which the district court drew the "procedural components." CM Rule 10.12. Thus, the "procedural components" are explicitly incorporated into the Rules by reference. Administrative rules need not recite legal principles precisely as formulated by a reviewing court to be constitutional. Such a standard would impose a hyper-technical and essentially unattainable drafting requirement and put a broad range of administrative rules that can be constitutionally applied at risk of being stricken.

D. The Rules Would Be Constitutional Even If The "Procedural Components" Were Not Incorporated Into The Rules

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[48] "[T]he [Director] is 'the expert on the spot,' and we are constrained to realize the converse, that 'judges are not super engineers.' The legislature intended to place upon the shoulders of the [Director] the primary responsibility for a proper distribution of the waters of the state." *Id.* (citations omitted).

Even assuming for purposes of argument that the "procedural components" are not incorporated into the Rules, such an absence would not render the Rules facially invalid unless they are incapable of constitutional application under any set of circumstances. *Moon*, 140 Idaho at 545, 96 P.3d at 646. The district court made no such determination in this case. Even if such an absence made an unconstitutional application of the Rules hypothetically possible, "the mere possibility of a constitutional violation is insufficient to sustain a facial challenge." *West Virginia v. U.S. Dept. of Health & Human Servs.*, 289 F.3d 281, 292-93 (4th Cir. 2002) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Even the perceived likelihood or threat of an unconstitutional application in certain circumstances will not support a facial challenge. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164 (4th Cir. 2000) ("'[i]t has not been the Court's practice' to strike down a statute on a facial challenge 'in anticipation' of particular circumstances, even if the circumstances would amount to a 'likelihood'") (quoting *Bowen v. Kendrick*, 487 U.S. 589, 612-13 (1988)).

Moreover, there is no blanket requirement that administrative rules recite selected elements of the applicable law to survive a facial challenge—the test is whether the rules can be lawfully applied as written. For instance, in *Pitts v. Perluss*, 377 P.2d 83 (Cal. 1962), insurance companies challenged an administrative regulation for, among other things, the lack of a weighting formula applying cost factors that had been expressly enumerated in the underlying statute. *Pitts*, 377 P.2d at 95-96. The California Supreme Court rejected the challenge and made it clear that if an administrative rule can be lawfully applied, a court should not rely on its view

of how the rule should have been drafted as a basis for invalidating it. *Pitts*, 377 P.2d at 96.[49] Similarly, in *Louisiana Chemical Association v. Bingham*, 550 F. Supp. 1136 (W.D. La. 1982), *aff'd*, 731 F.2d 280 (5th Cir. 1984), the court rejected the argument that an OSHA records-access rule was facially defective "simply because the rule contains no express provision reiterating the *Barlow's* warrant requirement,"[50] holding that "[t]he omission of a warrant clause, however, will not invalidate the rule." *Louisiana Chemical Ass'n*, 550 F.Supp. at 1140.

Further, challenged rules can rely on "existing law" to fill any perceived gaps. *Id.* (rejecting the argument that the challenged regulation did not recite the "exact means" of access allowed under *Barlow's* because "existing law" provided the means of access). Existing Idaho law provides the "procedural components" the district court identified, and the Rules incorporate "all elements of the prior appropriation doctrine as established by Idaho law." CM Rule 20.02.

E. The District Court Erred In Holding That The Rules Do Not Provide For Timely Administration In Response To A Delivery Call.

The district court further erred in holding that the Rules do not provide for timely administration in response to a delivery call, as demonstrated by the straightforward procedure applicable in water districts having a common ground water supply.

The senior submits a call, the Director determines whether junior ground water uses are materially injuring the senior, and if so the juniors are regulated in accordance with priorities.

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[49] *See* also *id.* at 89 "this court does not inquire whether, if it had the power to draft the regulation, it would have adopted some method or formula other than that promulgated by the director. The court does not substitute its judgment for that of the administrative body").

[50] The "*Barlow's* warrant requirement" was a Supreme Court ruling that a contested search under the Occupational Safety and Health Act requires a warrant or subpoena. *Id.* (discussing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). Thus, the *Barlow's* requirement is a constitutionally-mandated procedural protection, but its omission from the rule did not render it incapable of lawful application. The same logic applies to the "procedural components" in this case.

CM Rule 40.01-.02. Outside water districts or ground water management areas, the Rules provide for expedited, informal resolution of delivery calls if doing so will not prejudice interested parties. Rule 30.03.

Further, IDWR's general rules of procedure, which apply to contested cases arising under the CM Rules, are to be "liberally construed to secure just, speedy and economical determination of all issues presented to the agency." IDAPA 37.01.01.052. Similarly, the Idaho Administrative Procedure Act authorizes emergency orders that are effective on issuance, such as the Relief Order issued in response to the Plaintiffs' delivery call. Idaho Code § 67-5247.

The Director's prompt response to the Plaintiffs' delivery call further demonstrates that the Rules provide for timely administration. The Director issued the Relief Order on the Plaintiffs' delivery call just a few weeks after the March 15 start of the 2005 irrigation season, and just twelve days after receiving the joint inflow forecasts for April through July. Appendix B at 1; Appendix C at 1-2. The Director expedited the Relief Order by issuing it prior to a hearing under Idaho Code § 42-1701A(3), and by making it an emergency order that was effective immediately under Idaho Code § 67-5247. Relief Order at 46. Watermasters served the junior ground water right holders subject to the Relief Order with notice by letters dated April 22, 2005. R. Vol. IX, p. 2245 ¶ 7; R. Vol. X, p. 2550, L. 5. Ground water right holders subject to the Relief Order began submitting replacement water plans to the Director for approval within two weeks, and most were approved or slightly modified by the Director within eight days of being submitted. *See* Appendix B at 1; Appendix C at 2-3.

In spite of this, the district court held that the Rules prevent timely administration

because the administrative hearing on the Relief Order had not taken place. Order at 13 n.2. This reasoning failed to recognize the distinction between an emergency order for relief and a subsequent administrative challenge to such an order, which are legally distinct stages of the proceedings.[51] *Compare* chapter 6, Title 42, Idaho Code ("Distribution of Water Among Appropriators") *with* chapter 52, Title 67, Idaho Code (the Idaho Administrative Procedure Act). There is no requirement in Idaho law that an administrative challenge to an emergency relief order on a delivery call be completed before the end of the season.

Moreover, a blanket requirement that administrative challenges be completed before the end of season—even when an emergency relief order is already in effect—could prevent adequate development of the factual record and otherwise raise significant due process concerns. It would also open the door for abuse, because an interested party could unilaterally transform an expedited order for emergency relief into a claim for an unconstitutional failure to respond to a delivery call, simply by challenging the order after it was issued.[52]

The district court also erred in assuming that the Director must convene an administrative hearing on a delivery call before issuing a final order for relief. *See* Order at 101-02 (describing an administrative procedure that requires a "hearing" prior to a "final decision"). Idaho law establishes no such requirement, and in fact explicitly authorizes the Director to expedite his

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[51] This analysis was also flawed as a matter of law because it was based on the application of the Rules to the Plaintiffs' delivery call, which cannot support a determination that the Rules are facially invalid. *See State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003) (facial and as-applied analyses are "mutually exclusive").

[52] For instance, the Relief Order would have been final by its own terms but for requests for an administrative hearing by Plaintiffs and IGWA. Relief Order at 46. The Plaintiffs proposed that the hearing take place in January 2006, well after the irrigation season, and then sought stays and continuances in the hearing schedule—once for a period of two years. *See* Appendix B at 2-3. In the district court, the Plaintiffs characterized these self-inflicted "delays" as an "administrative quagmire" created by the CM Rules. R. Vol. VIII, p. 9.

response to a delivery call by issuing an order for relief prior to a hearing or other proceedings. *See* Idaho Code § 42-1701A(3) (providing for post-order hearings); *id.* § 67-5247 (authorizing issuance of emergency orders). The district court's reasoning ignores these statutes and would have the perverse effect of transforming a statutorily-authorized attempt to provide expedited relief into a failure to respond to a delivery call.

F. The Rules Give Proper Effect To Decrees And "Objective Standards."

Contrary to the district court's suggestion, the Rules give proper legal effect to water right decrees. *See, e.g.,* CM Rule 41.04 (preparation of a water right priority schedule); CM Rule 30.01(a) (providing that the senior's water right decree is part of the information necessary for the Director to respond to a delivery call); CM Rule 10.25 (defining a water right as being "evidenced by a decree, a permit or license"); *see also* CM Rules 000, 001, 10.07, 10.15, 10.18, 20.02, 20.04, 30.07(f)-(g), 30.09, 30.10, 40.01(a), 40.02, 40.02(a), 40.02(e), 40.05, 41.01, 41.02(c), 41.04, 43.03, 43.03(k) (recognizing or implementing the rule of senior priority).

The district court was also incorrect in holding that the Rules do not include "objective standards" to guide the application of the substantive factors and policies in the Rules. For instance, Rule 42 sets out a number of objectively measurable or verifiable factors that the Director takes into account in responding to delivery calls. *See generally* CM Rule 42.01. The standards set forth in this Court's decisions also guide the application of the substantive factors and policies of the Rules. *See* CM Rule 20.02 (incorporating by reference all elements of the prior appropriation doctrine as established by Idaho law).

IV. THE RULES PROVIDE FOR ADMINISTRATION OF WATER RIGHTS IN

ACCORDANCE WITH PRIOR APPROPRIATION DOCTRINE.

A. The District Court's "Re-Adjudication" Holding Ignored The Plain Language Of The Rules And Relied On Improper Presumptions.

The district court erred in concluding that the Rules authorize *de facto* administrative "re-adjudications" because the Rules incorporate all elements of the prior appropriation doctrine as established by Idaho law, which prohibits such "re-adjudications." Moreover, the district court's discussion of administrative "re-adjudications" and "takings" was based on improper presumptions rather than the language of the Rules.

The district court essentially assumed the worst, discussing at some length its suspicions that the Director would use the Rules to undermine decreed rights or otherwise act unlawfully. *See generally* Order at 94-97, 116-17, 121-24 (discussing the possibility of administrative "re-adjudications" or "takings"). Such adverse presumptions have no place in a facial challenge. *See Rhodes,* 125 Idaho at 142, 868 P.2d at 470 ("this Court makes every presumption in favor of the constitutionality of the challenged regulation"). Similarly, a court may not make factual presumptions against the non-moving party at summary judgment. *Concerning Application for Water Rights of Midway Ranches Property Owners' Ass'n, Inc. in El Paso and Pueblo Counties*, 938 P.2d 515, 526 (Colo. 1997) ("We cannot presume that the water officials will fail to discharge their duties in distributing the available water supply according to applicable decrees and priorities").

B. The SRBA Does Not Adjudicate All Issues That Must Be Resolved For Conjunctive Administration Of Water Rights.

The district court also incorrectly assumed that the Rules re-visit matters that have been

adjudicated, when in fact water right adjudications do not decide all the factual questions relevant to administration, but rather leave many to the administration process. *See, e.g., Tudor v. Jaca*, 164 P.2d 680, 686 (Or. 1946) ("The court, having established the priorities, should not attempt to anticipate exigencies which may arise in administration of the decree, but should leave such matters to the water master, whose duty it is to preserve the priorities and the quantities consistently with the highest duty of water, as applied to all concerned") (internal quotation marks and citation omitted).

This is particularly true as to conjunctive administration, which "requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." *A & B Irr. Dist.*, 131 Idaho at 422, 958 P.2d at 579. These matters are left to IDWR because the SRBA cannot and does not make all these technical determinations, as the SRBA district court has observed:

> the scope of these proceedings should not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights (i.e. which particular junior water rights will be curtailed in the event of a delivery call by a senior). Factually, the Court could not make findings as to exact relationships. As indicated by IDWR, the technology and the data do not presently exist for making such determinations. Even if the technology and data did exist the task of making such factual determinations would be monumental in terms of scope. Lastly, the specific interrelationships are dynamic as opposed to static. Therefore, any factual determinations made by the Court would be subject to change depending on climatic conditions and future geological activity.

Order on Basin-Wide Issue 5 at 19.

The factual determinations necessary for the conjunctive administration of individual water rights are not "re-adjudications" because such determinations are not made in the SRBA, but rather are made in the first instance by IDWR, "based on its knowledge and data regarding how the water rights are physically interrelated. Mechanisms are available for water right holders in disagreement with IDWR's administrative actions to challenge and seek review of the same." *Id.* This is entirely consistent with the different statutory functions of the SRBA and IDWR. "Legally, the Court also does not need to adjudicate the specific interrelationships between water rights. IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determines specific interrelationships based on information not necessarily contained in the partial decree." *Id.*

The decreed quantity for a water right is not necessarily conclusive for purposes of conjunctive administration because water rights are limited by actual beneficial use, regardless of decreed quantity. *Briggs*, 97 Idaho at 435 n.5, 546 p.2d at 390 n.5; Idaho Code § 42-220. While a senior has a right to use up to the full amount of his decreed right when necessary to achieve the authorized beneficial use, beneficial use is a "fluctuating limit" that depends on the circumstances, as the district court recognized. Order at 87. It is also "a continuing obligation," *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997), and properly taken into account in the administration of water rights under chapter 6, Title 42 of the Idaho Code. Indeed, "[t]he governmental function in enacting ... the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Id.* (quoting *Nettleton v. Higginson*, 98 Idaho 87, 91, 558

P.2d 1048, 1052 (1977)) (ellipsis in *Hagerman*). Thus, an administrative inquiry into actual beneficial use and needs in responding to a delivery call does not amount to a "re-adjudication." The entry of a partial decree does not terminate the Director's statutory duty and authority to make appropriate factual determinations and apply the substantive factors and policies of the Rules in responding to delivery calls and administering water rights.

C. The Director's Reasonable Exercise Of His Statutory Authority To Administer Water Rights Does Not Threaten A "Re-Adjudication."

Similarly, the Director's reasonable exercise of his statutory authority in applying these principles in water rights administration does not constitute a "re-adjudication" or uncompensated taking. "[The State Engineer is] called upon at times to exercise judgment and decide questions, but, when the judgment is exercised as a means of administering the law, the act is administrative rather than judicial." *Speer v. Stephenson*, 16 Idaho 707, 718, 102 P. 365, 369 (1909); *see also Arkoosh v. Big Wood Canal Co.* 48 Idaho 383, 395-96, 283 P. 522, 525-26 (1929) (holding that the commissioner of reclamation determines when an appropriator is able to beneficially use water and may either deliver or refuse to deliver water, even though the decree made the appropriator the judge of when water could be so used); *A & B Irr. Dist.*, 131 Idaho at 415, 958 P.2d at 572 ("The Director has the administrative duty and authority . . . to prevent wasteful use of water by irrigators").

The district court also erred in concluding that the Director "becomes the final arbiter regarding what is 'reasonable'" under the Rules. Order at 96. As previously discussed, the Rules include a number of objective standards to guide the Director's application of the

substantive policies in the Rules. Further, the concepts of reasonable diversion and use of water are well established and defined in this Court's cases,[53] and these standards are incorporated into the Rules. CM Rule 20.02. Moreover, the Director's orders and determinations under the Rules are subject to judicial review under IDAPA and the applicable substantive law.

D. The Substantive Factors And Policies Of The CM Rules Are Inherent Limitations On A Water Right, Not A "Re-Adjudication" Or "Taking."

Idaho water rights are inherently subject to prior appropriation principles such as beneficial use, waste, and futile call. *See, e.g., Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 59 F.2d 19, 23 (9th Cir. 1932) ("The extent of beneficial use is an inherent and necessary limitation upon the right"); *Schodde*, 224 U.S. at 120 (similar). Because these principles "inhere in the title" to a water right under Idaho law, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the Rules do not impose any new limitations on water rights. These factors and policies are as much a part of an Idaho water right as the priority date, and the Rules' recitation of them in no way re-adjudicates, diminishes or takes a water right.

Further, it is well established in Idaho that property rights are "subject to reasonable limitation and regulation by the state in the interests of the common welfare." *Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953). This principle has particular force with regard to water rights, which entitle the holder only to a right to use a publicly owned resource:

The water belongs to the state of Idaho. And the right of the state to regulate and

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[53] *See, e.g.,Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207-08, 252 P. 865, 867 (1926); *see also Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107, 120-21 (1912); Idaho Code § 42-226.

> control the use, by appropriate procedural and administrative rules and regulations, is equally well settled. An appropriation or rental use gives the appropriator or user no title to the water; his right thus acquired is to the *use* only.

Board of Directors of Wilder Irr. Dist. v. Jorgensen, 64 Idaho 538, 551,136 P.2d 461, 466 - 67 (1943) (internal citations omitted; emphasis in original) (Ailshie, J., concurring).

It is widely recognized that the police power of the state includes the authority to regulate use under decreed water rights. *See, e.g., State ex rel. Cary v. Cochran*, 292 N.W. 239, 244 (Neb. 1940); *Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F.Supp. 571, 574 (D.Nev. 1938); *Hamp v. State*, 118 P. 653, 661-62 (Wyo. 1911). The prior appropriation doctrine is not simply a means of creating and enforcing private property rights. It is also a system that regulates the ongoing use of a publicly owned resource, and promotes the maximum beneficial use and development of the state's water. The Rules' inclusion of such principles is not a "taking," but rather reflects the inherent nature and scope of an Idaho water right.

V. THE DISTRICT COURT ERRED IN FINDING THE "REASONABLE CARRYOVER" PROVISION FACIALLY UNCONSTITUTIONAL.

A. The Plain Language Of The "Reasonable Carryover" Provision Demonstrates That It Can Be Constitutionally Applied.

The "reasonable carryover" rule provides that in responding to a delivery call, the Director may consider:

> The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and

> the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

Rule 42.01(g) (emphasis added).

Contrary to the district court's view, nothing in this provision purports to or has the effect of authorizing the Director to re-determine the quantity element of a storage right—much less re-determine it annually—or determine the amount of water that may legally be carried over year to year. Order at 110. Rather, the "reasonable carryover" provision ensures that junior rights are not curtailed unless the senior is likely to need additional water to fulfill the beneficial use for which the storage was authorized during the current and next irrigation seasons. This is consistent with—indeed, it is required by—the fundamental principle that a water right entitles the holder only to the quantity of water actually required for the beneficial use, regardless of the decreed or licensed quantity. *Briggs*, 97 Idaho at 435 n.5, 546 P.2d at 390 n.5; Idaho Code § 42-220. The prior appropriation doctrine as established by Idaho law does not allow curtailment of vested junior rights when the senior does not need additional water to achieve the authorized beneficial use. As stated in the Ninth Circuit's decision in the *Schodde* case, "[w]hile any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public." *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43, 47 (9th Cir. 1908), *aff'd* 224 U.S. 107 (1912) (internal quotation marks and citation omitted).

This principle is particularly applicable to storage carryover, because in many cases it is not necessary to carry a full reservoir allotment over from year to year to fully achieve the authorized beneficial use, and in such cases curtailment would not be justified. Moreover,

curtailing juniors in order to fill reservoirs with water that is not needed to achieve the beneficial use would concentrate control of vast quantities of water in a relatively few storage right holders, which is contrary to the prior appropriation doctrine:

> It is easy to see that, if persons appropriating the waters of the streams of the state became the absolute owners of the waters without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state.

Id. at 47-48 (internal quotation marks and citation omitted).

Further, storage rights are often expressly "supplemental" to primary natural surface flow rights. *See, e.g., Nampa & Meridian Irr. Dist. v. Petrie,* 28 Idaho 227, 231, 153 P. 425, 426 (1915), *error dismissed,* 248 U.S. 194 (1918) (referring to "supplemental storage water" under a contract with the federal government).[54] Requiring the application of supplemental storage water for the beneficial use authorized by the primary right before curtailing juniors is consistent with the nature of supplemental storage rights, and promotes maximum beneficial use of the state's water.

In addition, many reservoirs are operated not just for irrigation but also for flood control, and must have sufficient space available after the irrigation season to hold runoff. Administering to ensure maximum carryover regardless of actual beneficial use or needs would often leave water in the reservoir that would have to be released for flood control purposes, resulting in an unreasonable waste of water and the unnecessary curtailment of juniors, contrary to Idaho law.

B. *Talboy* Did Not Establish Or Recognize That A Storage Right Includes A Vested

[54] The Plaintiffs admitted that they "acquired storage water rights to supplement their natural flow diversions." R. Vol. V, p. 1024. The underlying storage rights are held in the name of the USBR , which viewed the storage supply as "almost wholly supplemental to other, older rights." Appendix G.

Entitlement To Unrestricted Carryover.

The district court read too much into *Washington County Irrigation District v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935), in holding that a storage right includes a "vested property right" to carry the full storage allotment in the reservoir without any limitation as a matter of Idaho law. Order at 115. The property interest in storage water recognized in *Talboy* is a qualified one "impressed with the public trust to apply [the water] to a beneficial use." *Talboy*, 55 Idaho at 389, 43 P.2d at 945. Moreover, *Talboy* did not raise or discuss the question of carryover.

Carryover was addressed in *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 258 P. 532 (1927), a case in which this Court recognized that public policy imposes a reasonableness limitation on carryover. *Glavin* involved a challenge to a canal company rule authorizing nearly unlimited storage carryover by individual users and this Court affirmed an injunction against the rule. This Court looked unfavorably on the rule's potential to allow individual users to "hoard [water] against other users who could and would have made beneficial use," and to "speculate with it, rather than making a beneficial use of it." *Id.* at 587-88, 258 P. at 533. Relying on the "the public policy of this state," the Court held that "whatever may be the exact nature of the ownership by an appropriator of water thus stored by him, any property rights in it must be considered and construed with reference to the reasonableness of the use to which the water stored is applied or to be applied." *Id.* at 588-89, 258 P. at 534.

Glavin involved different users in a single project, but was decided on global principles of Idaho water law that apply with equal force between different appropriators and water rights. The case demonstrates that the determination of the amount of carryover depends on the facts of

the case, not a blanket rule of law. *See also Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 216, 157 P.2d 76, 81, 83 (1945) (upholding a revised and more limited carryover rule for the same project on the basis that the new rule "differ[ed] radically and remedially from the one voided in *Glavin*" by limiting carryover to one-third of the face amount of the user's right and making deductions for evaporation and seepage losses).

C. The District Court Improperly Relied On A "Hybrid Analysis" In Finding The "Reasonable Carryover" Provision Facially Defective.

The district court also erred in finding the "reasonable carryover" provision unconstitutional based on its "threatened application" to the Plaintiffs' delivery call. Order at 111-12, 115-17. The district court based its "threatened application" conclusion on a review of selected portions of the Relief Order the Director issued in response to the Plaintiffs' delivery call. *Id.* at 111-12. This inquiry "erroneously combined the facial and 'as applied' standards" in an impermissible "hybrid analysis." *Korsen*, 138 Idaho at 715, 69 P.3d at 135; *see also Greenville Women's Clinic*, 222 F.3d at 164 ("'[i]t has not been the Court's practice' to strike down a statute on a facial challenge 'in anticipation' of particular circumstances, even if the circumstances would amount to a 'likelihood'") (quoting *Bowen*, 487 U.S. at 612-13).

D. The District Court's "Takings" Analysis Was Incorrect As A Matter Of Law And Relied On An Incomplete Factual Record.

The district court erroneously held that the Rules physically "take" private water rights. Order at 122-24. Takings cases are generally placed into two categories: "physical" takings and "regulatory" takings. *Moon*, 140 Idaho at 540-41, 96 P.3d at 642-43. The Rules do not affect either type of taking on their face because they do not authorize or amount to an "actual physical

taking of the [water rights]," nor do they deprive water right holder owners of "all economically beneficial uses" of such rights. *Id.* at 541-42, 96 P.3d at 642-43 (internal quotation marks and citation omitted)

Further, takings cases require a threshold determination of the nature of the property right in question. *See Lucas,* 505 U.S. at 1022-24; *Moon*, 140 Idaho at 542, 96 P.3d at 643. Such a determination was not possible in this case because the underlying storage rights have not yet been adjudicated in the SRBA, and the question of the nature and scope of a storage spaceholder's interest in the underlying storage rights is currently pending before this Court in *United States v. Pioneer Irrigation District.*[55] Moreover, the Plaintiffs did not properly plead a "takings" cause of action.[56]

Moreover, as the district court found, the Plaintiffs' storage contracts "are not in the record in this case." Order at 109. The district court went to considerable lengths to fill in the omissions in the record, *see, e.g.,* Order at 110 (relying on a footnote to the Complaint and the Director's orders), but the incomplete record precluded a "takings" analysis.

VI. THE DISTRICT COURT ERRED IN RULING THAT THE DIRECTOR ACTED OUTSIDE HIS AUTHORITY IN PROMULGATING THE CM RULES.

The district court relied on its determination that the CM Rules are facially unconstitutional as the basis for holding that the Director acted outside his authority in promulgating the Rules. Order at 3, 125. As discussed above, the Rules are facially

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[55] Docket No. 31790, appeal filed April 14, 2005.

[56] There is only one "takings" allegation in the Complaint, and no request for "takings" relief. R. Vol. I, p. 8 ¶ 17; *id.*, p. 11. Even under notice pleading standards, this single allegation without any corresponding request for relief fails to state a "takings" claim.

constitutional, and thus the Director acted within his statutory authority. Idaho Code § 42-603.

VII. THE DISTRICT COURT IMPROPERLY CIRCUMVENTED THE EXHAUSTION REQUIREMENT OF THE IDAHO ADMINISTRATIVE PROCEDURE ACT.

A. The District Court Allowed The Facial Challenge To Become A Vehicle For Litigating As-Applied Claims and Disputed Facts On An Incomplete Record.

The district court correctly found as a factual matter that the Plaintiffs had not exhausted administrative remedies on their as-applied claims, and thus limited summary judgment to the facial challenge alone. R. Vol. VI, pp. 1312, 1314; Tr. Vol. I, pp. 130, 132-33, 135; R. Vol. VIII, p. 1813. A facial challenge to the Rules is "purely a question of law," *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998), and is limited to an analysis of their language "on a cold page and without reference to the defendant's conduct." *People v. Stuart*, 100 N.Y.2d 412, 421 (N.Y. 2003); *see also Korsen*, 138 Idaho at 712, 69 P.3d at 132 (holding that facial and as-applied analyses are "mutually exclusive"). The district court avoided these well-established standards under a misinterpretation of Idaho Code § 67-5278 that circumvented the exhaustion requirement, and transformed the purely legal question of the facial validity of the Rules into a vehicle for litigating the Plaintiffs' as-applied claims and resolving disputed issues of fact.

The district court held that Idaho Code § 67-5278 established a "threatened application" standard under which the Director's actual and threatened application of the CM Rules to the Plaintiffs' delivery call was "part and parcel" of the facial challenge, and that there was no better "evidence" of the facial constitutionality of the CM Rules than "the actual conduct of IDWR and the Director to date" in the delivery call proceedings. R. Vol. VIII, pp. 1814-15. Under this standard, "the director's threatened application of the rule, or his application to date, as applied

to the rules, is subject to review." Tr. Vol. I, p. 316. The district court held that § 67-5278 authorizes "the use of a factual history of a case when determining a rule's validity" and stated that "this Court will utilize the underlying facts in this case to determine whether the CMR's are invalid." Order at 25.

The Plaintiffs used the "threatened application" standard to pursue their as-applied claims under the rubric of a facial challenge. *See, e.g.*, R. Vol. IX, pp. 2252-53 n.4 ("Here, the examples provided by Plaintiffs demonstrate legal defects of the Rules on their face as well as the underlying facts in how the Director unconstitutionally applied the Rules to their requests for water right administration"); Tr. Vol. I, p. 175 (referring to the Defendants' supplemental briefing under the "threatened application" standard as addressing "the as-applied portion of our claims"). Indeed, the Plaintiffs' principal argument throughout the case was that the application of the Rules to their delivery call proved that the Rules themselves were facially invalid. *See, e.g.*, R. Vol. V, p. 1192 (arguing that because the Rules "allow the Department to diminish and limit Clear Springs' vested property rights, its decreed water rights, the Rules are unconstitutional on their face"); Tr. Vol. I, p. 324 ("I'm showing that's how he applied the rules, and that is not a proper application. He believes the rules allow him to do that. And therefore, they're unconstitutional").[57]

The district court similarly intertwined the mutually exclusive issues of facial and as-applied constitutionality. For example, the district court's holding that the CM Rules are facially

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[57] *See also* R. Vol. V, pp. 999-1000, 1001-02, 1023-30, 1032, 1034-35, 1194-95, 1201-08, 1210-11, 1215, 1217-18, 1245, 1248; R. Vol. VI, pp. 1280-81; R. Vol. VIII, pp. 1898-99, 1905-06, 1909, 1912 n.16, 1913-15, 1917, 1938, 1947, 1969-72, 1974, 1984; R. Vol. IX, pp. 2252-53 n.4, 2262, 2265 n.18, 2269-70, 2281, 2285; Tr. Vol. I, pp. 165, 175, 186, 194-95, 203-07, 210-11, 218-19, 222-23, 232, 304, 307, 323-24, 331-32.

unconstitutional "to the extent that the Director's application of the CMR's diminish proper administration of the senior's water right," Order at 97, is essentially indistinguishable from the flawed "hybrid" holding in *Korsen* that a statute was facially unconstitutional "insofar as it applies to public property." 138 Idaho at 710, 69 P.3d at 130.

Over the Defendants' repeated objections, the district court considered and resolved disputed factual matters by concluding, on the basis of allegations and argument rather than a properly developed record, (1) that the Director's orders amounted to "threatened applications" of the Rules that were contrary to the prior appropriation doctrine, Order at 111-15; (2) that in responding to the Plaintiffs' delivery call the Director "promptly engaged on a course under the CMR's inconsistent with his own words [in his May 2, 2005 order]," Order at 125; (3) that the Director's administration of the Plaintiffs' water rights had not been completed, Order at 13 n.2, 91; (4) that the Director's reliance on historic water supply and use data in attempting to predict future supplies and uses had no rational basis in fact, Order at 116; and (5) that the Director had refused to administer junior priority ground water rights in a timely fashion. Order at 117.

The district court also apparently concluded that the Director was using the Plaintiffs' reservoir storage water as a "slush fund" to spread water and avoid administering junior ground water rights in priority, Order at 114; that the Director was attempting "to satisfy all water users on a given source" rather than "objectively administering water rights in accordance with the decrees," Order at 97; and that the Director was trying to "'shoe-horn' in a complete re-evaluation analysis of the scope and efficiencies of a decreed water right in conjunction with an administrative delivery call." Order at 92. Even the hearing on the motion for Rule 54(b)

certification of the Judgment became a vehicle for the Plaintiffs to attempt to control the delivery call proceedings and the district court to inquire into the Director's intentions in that proceeding. Tr. Vol. I, pp. 343, 349, 351, 356, 358.

Thus, despite the Defendants' repeated objections, this case was litigated and decided under a forbidden "hybrid analysis." *Korsen*, 138 Idaho at 715, 69 P.3d at 135. It was an improper use of a declaratory judgment action to "bypass the administrative process" and obtain premature judicial review of an ongoing administrative proceeding. *Regan v. Kootenai County*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004), and "to try [disputed issues of fact] as a determinative issue." *Ennis v. Casey*, 72 Idaho 181, 185, 238 P.2d 435, 438 (1951).

B. Idaho Code § 67-5278 Does Not Provide That A Rule May Be Declared Facially Invalid On The Basis Of A "Threatened Application."

The judicial review and factual inquiry undertaken in this facial challenge was based on district court's view that under Idaho Code § 67-5278, the validity of a challenged rule is determined on the basis of its "threatened application." This reading of the statute was incorrect because the language merely authorizes a declaratory judgment challenge to the legal validity of a rule "if it is alleged that the rule, or its threatened application" may adversely affect legal rights. Idaho Code § 67-5278(1). The statute does not provide the substantive standard for determining the validity of a challenged rule. *See Richards v. Select Ins. Co., Inc.*, 40 F.Supp.2d 163, 169 (S.D.N.Y. 1999) ("A declaratory judgment is a remedy. Its availability does not create an additional cause of action or expand the range of factual disputes that may be decided by a district court sitting in diversity").

Rather, the statutory term "threatened application" is properly understood as establishing a standing or ripeness threshold. *See Rawson v. Idaho State Board of Cosmetology*, 107 Idaho 1037, 695 P.2d 422 (1985) (analyzing § 67-5278, then codified as § 67-5207, in terms of standing), *rejected in part on other grounds by Golay v. Loomis*, 118 Idaho 387, 392 n.3, 79 P.2d 95, 99 n.3 (1990). "[A] declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists . . . justiciability questions [include] standing [and] ripeness." *Schneider v. Howe*, 142 Idaho 767, ___, 133 P.3d 1232, 1237 (2006) (internal quotation marks and citation omitted).

Moreover, the Idaho Administrative Procedure Act provides that "disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter." Idaho Code § 67-5277 (emphases added). Section 67-5277 makes it clear that factual litigation regarding an agency action must proceed via "judicial review," not a declaratory judgment action under § 67-5278, and must be based on a complete "agency record," including a final order. *See* Idaho Code §§ 67-5270, 67-5271 , 67-5275 . The district court's view of § 67-5278 as "contemplating" the use of the factual history of an ongoing administrative case in determining the validity of a rule cannot be squared with § 67-5277's express prohibition against litigating disputed facts on an incomplete record in a declaratory judgment action. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002) ("a basic tenet of statutory construction is that the more specific statute or section addressing an issue controls over a statute that is more general").

No reported Idaho case has interpreted § 67-5278 as authorizing judicial review of an agency proceeding or the litigation of disputed issues of fact. To the contrary, in *Rawson* the

Court of Appeals held that the district court had acted "prematurely" in reaching a factual question the agency had not yet decided and "in essence took the issue from the Board and decided it de novo." *Rawson*, 107 Idaho at 1041, 695 P.2d at 426. Similarly, there was no litigation of disputed factual issues in *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003). Even in *Lindstrom v. Dist. Bd. of Health*, 109 Idaho 956, 712 P.2d 657 (Ct. App. 1985), which involved both facial and as-applied challenges, no disputed issues of fact remained when the case came to the Court of Appeals. *Lindstrom*, 109 Idaho at 959, 712 P.2d at 660.

These cases are consistent with the principle that while a court may pass on a constitutional challenge to a statute administered by an agency in a declaratory judgment action, "it ha[s] no jurisdiction to investigate the facts, to make findings thereon or to determine the credibility of witnesses" when "[t]hese were questions to be determined by [the agency] in the first instance reviewable on appeal." *Idaho Mut. Ben. Ass'n, Inc. v. Robison*, 65 Idaho 793, 803, 154 P.2d 156, 161 (1944); *see also Regan*, 140 Idaho at 725-26, 100 P.3d at 619-20 (declaratory judgment action that "exalts form over substance" may not be used to bypass administrative remedies); *Ennis*, 72 Idaho at 185, 238 P.2d at 438 (declaratory judgment action "cannot be used where the object of the proceedings is to try [a disputed issue of fact] as a determinative issue").

Under the district court's reasoning, "a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo. Ct. App. 1998). If the district court's interpretation of Idaho Code § 67-5278 is not reversed, the Idaho courts will replace the

Department as the primary venue for administering water rights. District courts will become *de facto* water courts, and the exhaustion requirement will largely be read out of the Idaho Administrative Procedure Act.

C. The District Court Erred By Declining To Dismiss The As-Applied Claims For Failure To Exhaust Administrative Remedies.

The Plaintiffs requested an administrative hearing on the Relief Order, but filed this action before the hearing had taken place. Thus, the district court correctly found that "[a]s to the 'as applied challenge' . . . the plaintiffs have not yet exhausted those [administrative] remedies." R. Vol. VI, pp. 1312; *see also* Tr. Vol. I, p. 130, LL. 13-14 ("that decision [on the Plaintiffs' delivery call] has not been made by the director, there's no final determination there"). The district court declined to dismiss the as-applied claims, however. *See* R. Vol. VI, pp. 1312, 1314 (declining to rule on exhaustion and avoiding a ruling on the as-applied claims).

Under the Idaho Administrative Procedure Act, "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." Idaho Code § 67-5271(1). IDWR rules incorporate this statutory exhaustion requirement. IDAPA 37.01.01.790. Even when an agency action is challenged on constitutional grounds, "exhaustion of administrative remedies is generally required before constitutional claims are raised." *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005); *see also Theodoropoulos v. I.N.S.*, 358 F.3d 162, 172 (D.C. Cir. 2004), *cert. denied,* 543 U.S. 823 (2004) ("a constitutional attack upon an agency's interpretation of a statute is subject to the exhaustion requirement"). When a claimant has not exhausted administrative remedies,

"dismissal of the claim is warranted." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003). The district court thus erred in failing to dismiss the as-applied claims.

CONCLUSION

For the reasons discussed herein, the Defendants request that this Court affirm the district court's holding that the Rules can be constitutionally applied and are consistent with the prior appropriation doctrine as established by Idaho law, and reverse the district court's holdings (1) that the Rules are unconstitutional due to the perceived absence of the "procedural components," and (2) that the "reasonable carryover" provision is unconstitutional. The Defendants also request that this Court remand this case to the district court with instructions to dismiss the as-applied claims without prejudice for failure to exhaust administrative remedies.

RESPECTFULLY SUBMITTED this 27th day of October 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of October 2006, I caused to be served a true and correct copy of the foregoing DEFENDANTS-APPELLANTS' OPENING BRIEF ON APPEAL to the following parties by the indicated methods: U.S. Mail, postage prepaid and E-mail

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IDAHO GROUND WATER APPROPRIATORS, INC., MAGIC VALLEY GROUND WATER DISTRICT, and NORTH SNAKE GROUND WATER DISTRICT, Plaintiffs, THE IDAHO DEPARTMENT OF WATER RESOURCES and DAVID R. TUTHILL, JR., IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, Defendants.	**Case No. CV-2007-0000526** **MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS**

Defendants the Idaho Department of Water Resources and David R. Tuthill, Jr., in his Official Capacity as Director of IDWR (collectively referred to as "IDWR" or the "Department"), submit this memorandum in support of their Motion to Dismiss and in opposition to Plaintiffs' request for a preliminary injunction.

I. INTRODUCTION

On April 30, 2007, IDWR informed ground water users in the Thousand Springs area that it was preparing curtailment orders that may affect individuals in that vicinity. *See* Complaint, Ex. A., Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area. As Plaintiffs' own exhibit shows, no actual orders for curtailment were issued. In response to the Department's notification, Plaintiffs filed this declaratory judgment action. By doing so, Plaintiffs ignored the administrative mechanism in place that must be exhausted prior to seeking relief in District Court.

Dismissal of this case is therefore appropriate because Plaintiffs have failed to exhaust any of their administrative options prior to filing in District Court. Indeed, since the Plaintiffs were also defendant interveners in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources,* 143 Idaho 862, 154 P.3d 433 (2007), they should have known that failure of any party to exhaust administrative remedies precludes a district court from considering injunctive relief. Under *American Falls,* exhaustion of administrative remedies is a jurisdictional requirement. Allowing Plaintiffs to proceed in District Court today, rather than after the exhaustion of administrative remedies, exalts form over substance at the expense of the orderly and efficient administration of complex water right matters over which the Department has primary jurisdiction. Accordingly, the Court should deny the request for a preliminary injunction and dismiss this case.

BACKGROUND FACTS & PROCEDURAL POSTURE

The Plaintiffs filed this action in response to a *Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area* (*Notice*) issued by the Director on April 30, 2007.[1] The *Notice* informed junior ground water right holders that they must provide replacement water on or before May 14, 2007, or the Director would issue curtailment orders to implement year

[1] A copy of the *Notice* and the attached map are attached as Exhibit A to Plaintiffs' Complaint.

three of the five-year phased curtailment schedule ordered on May 19, 2005, in response to the Blue Lakes Trout Farm, Inc. (Blue Lakes) delivery call. A similar *Notice* was sent to ground water right holders to implement year three of the five-year phased curtailment schedule ordered on July 8, 2005, in response to the Clear Springs Foods, Inc. delivery call for its Snake River Farm facility (Clear Springs).[2] The delivery calls were made under the Department's Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11).

The Blue Lakes water rights authorize the diversion of water from Alpheus Creek located in the Devil's Washbowl to Buhl Gage spring reach north of Twin Falls. The Director's order of May 19, 2005, issued in response to the Blue Lakes delivery call, determined that the diversion and use of ground water within Water District 130 under water rights with priority dates junior to December 28, 1973, causes material injury to Blue Lakes' December 28, 1973, priority water right no. 36-07427 in the amount of 51 cfs. *See* Order issued May 19, 2005, *In the Matter of Distribution of Water to Water Rights Nos. 36-2356A, 36-7210, and 36-7427.* The Blue Lakes Order required ground water districts representing junior ground water users in Water District No. 130, to submit plans acceptable to the Director for providing replacement water, or junior-priority ground water rights would be curtailed over a period of five years. The Blue Lakes Order stated that, in 2005, ground water users must provide 10 cfs in replacement water to Blue Lakes. Because the Director issued the order before an opportunity for a hearing, the order stated, "Any person aggrieved by the Order shall be entitled to a hearing before the Director to contest the action pursuant to Idaho Code § 42-1701A(3)." The Blue Lakes Order provided that replacement water in the amount of 30 cfs shall be delivered during year three (2007) to the Devil's Washbowl to Buhl reach.

[2] Copies of the Blue Lakes and Clear Springs orders are available on IDWR's website at: http://www.idwr.idaho.gov/Calls/Spring%20Users%20Calls/default.htm.

The Clear Springs water rights for use at its Snake River Farm authorize the diversion of water from springs tributary to Clear Lakes located in the Buhl Gage to Thousand Springs reach east of Buhl. The Director's order of July 8, 2005, issued in response to the Clear Springs delivery call, determined that the diversion and use of ground water within Water District 130 under water rights with priority dates junior to February 4, 1964, causes material injury to Clear Springs' February 4, 1964, priority water right no. 36- 04013B. *See* Order issued July 8, 2005, *In the Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148*. The Clear Springs Order stated:

> Involuntary curtailment will be phased-in over a five-year period, offset by substitute curtailment (conversions and voluntary curtailment) provided through the ground water district(s) or irrigation district through which mitigation can be provided and verified by the Department. Involuntary curtailment and substitute curtailment together must be implemented in 2005, 2006, 2007, 2008, and 2009, such that based on simulations using the Department's ground water model for the ESPA, phased curtailment will result in simulated cumulative increases to the average discharge of springs in the Buhl Gage to Thousand Springs spring reach, which includes the springs that provide the source of water for the water rights held by Clear Springs for its Snake River Farm, at steady state conditions of at least 8 cfs, 16 cfs, 23 cfs, 31 cfs, and 38 cfs, for each year respectively.

Clear Springs July 2005 Order at p. 37, ¶ (2). The Clear Springs Order, thus, provides that 23 cfs shall be provided to the Buhl Gage to Thousand Springs reach in the third year, which is 2007.

The Plaintiffs in the present case intervened in both the Blue Lakes and the Clear Springs matters before the Department representing the affected ground water districts and their members. Although the parties requested hearings on the Director's orders in both proceedings, those hearings did not occur due to the filing of litigation by senior surface water right holders against the Department on August 15, 2005, challenging the constitutional validity of the Department's Conjunctive Management Rules. *American Falls Reservoir District #2 et al. v. Idaho Department of Water Resources*, Case No. CV-2005-600 (5th Jud. Dist., Gooding

County). A brief summary of the proceedings in the Blue Lakes and Clear Springs matters is set forth in a July 28, 2006, order of the Director. Exhibit A to Affidavit of Phillip J. Rassier ("*Order Requesting Briefing on Nature of Further Proceedings*").

On June 30, 2006, the Fifth Judicial District Court entered a judgment following its decision of June 2, 2006, in the *American Falls* case declaring that the Department's Conjunctive Management Rules, upon which the Director relied in administering the Blue Lakes and Clear Springs delivery calls, were invalid on constitutional grounds. On July 11, 2006, the Department filed an appeal with the Idaho Supreme Court. The Department also filed motions for stay before the district court and the Idaho Supreme Court, which were denied. The Idaho Supreme Court issued its decision upholding the facial constitutionality of the Conjunctive Management Rules on March 5, 2007, in the *American Falls* case. *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007). The Court's decision is not yet final due to a pending petition for rehearing filed by the plaintiffs in that case.

II. ARGUMENT

A. Summary Of Argument

"The party seeking the [preliminary] injunction has the burden of proving a right thereto." *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984). Under I.R.C.P. 65(e)(1) the moving party must demonstrate entitlement to the relief demanded, and, as such, a likelihood of prevailing at trial. *Id.* As the preceding discussion demonstrates, the Plaintiffs are not entitled to the relief demanded or likely to prevail at trial.

Plaintiffs are not likely to prevail because they failed to exhaust their administrative remedies. The Plaintiffs filed this case in District Court prior to an administrative hearing in an attempt to bypass administrative procedures and prematurely obtain judicial relief in a water

rights administration matter over which the Department has primary jurisdiction. Therefore, this case must be dismissed.

The Idaho Supreme Court in *American Falls*, made it clear that the doctrine of exhaustion applies even though the Plaintiffs have styled this case a declaratory judgment action challenging the authority of the Director to issue curtailment orders. This case is in effect a request for judicial review of the Director's orders and allowing it to proceed would exalt form over substance and promote forum-shopping during an ongoing administrative proceeding. Idaho law, therefore, requires that this case be dismissed.

B. The Director of IDWR Has The Authority To Issue Curtailment Orders

The Plaintiffs in this case seek to enjoin the Director of IDWR from taking action required under the provisions of I.C. § 42-607 relating to the administration of water rights by priority within a water district. The Plaintiffs seek to enjoin the Director from ordering the curtailment of junior priority ground water rights under which their members divert water. The Court should deny the request for a preliminary injunction because Plaintiffs cannot satisfy the grounds for a preliminary injunction under I.R.C.P. 65(e).

I.R.C.P. Rule 65(e)(2) states that a preliminary injunction may be granted "[w]hen it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." Through affidavits attached to their complaint, Plaintiffs assert claims of potential economic losses that would result in irreparable injuries if the Director carried out the proposed curtailment of their water rights. *See* Affidavits of Lynn Carlquist and Orlo H. Maughan. What the Plaintiffs fail to acknowledge is the harm that would be caused to the orderly administration of water rights if an injunction is granted. If the Director can be enjoined simply because a junior water right holder might suffer economic loss, then the prior appropriation doctrine will be turned on its head.

The Director has a duty to supervise and control the distribution of water within state water districts, as required by Idaho Code § 42-602. In order to fulfill this duty, the Director issued the warning letters of April 30, 2007, informing ground water users in the Thousand Springs area that IDWR was preparing curtailment orders that may affect their water rights.

The Plaintiffs' request for a preliminary injunction should not be granted because the Director's actions are consistent with Idaho law. Idaho water law requires the curtailment of a junior priority water right if necessary to fill a more senior water right. The action will not "produce waste" because the water will be made available to the spring reaches in which the senior right holders divert water. Although the Plaintiffs will experience an adverse impact as a result of the proposed regulation of their water rights by the Director, the impact does not constitute "great or irreparable injury" because it is an impact contemplated under the priority doctrine, which governs the administration of rights to the use of water in Idaho.

As part of the prior appropriation doctrine, it is understood that reduction or curtailment of junior priority water rights in order to satisfy senior priority water rights will result in an adverse effect upon the holders of the junior water rights. That is the nature of the administration of water rights under the prior appropriation doctrine in Idaho.

In Count I of the Complaint, the Plaintiffs argue that only a local ground water board has *the authority to curtail junior-priority ground water users – not the Director of IDWR.* (Complaint at ¶ 25, p. 7.) The argument is without merit.

First, under Idaho Code § 42-237a, the Director of IDWR has broad authority to enforce, supervise, and control the exercise and administration of all rights to the use of ground water in the state of Idaho:

> In the administration and enforcement of this act in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion, is empowered:
>
> ***
>
> g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of this discretionary power he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available.

Under the Director's authority to "supervise and control" the exercise of all rights to the use of ground water, he may issue orders to curtail the use of ground water. If displeased with the Director's decision, Plaintiffs may seek an administrative hearing.

Second, even if there is a question as to the Director's authority to issue curtailment orders, the Idaho Supreme Court held in *American Falls* that the question of authority or lack thereof requires the exhaustion of administrative remedies. In *American Falls,* the Supreme Court held "administrative remedies generally must be exhausted before constitutional claims are raised." *American Falls,* 154 P.3d at 442. By doing so, it recognized that other "jurisdictions have also refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that *no official in the proceeding is authorized to decide*. *Id.* (emphasis added). "[T]o hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue. *Foremont Ins. Co. v. Public Serv. Comm'n,* 985 S.W.2d 793, 795 (Mo. Ct. App. 1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record." *Id.* Even if Plaintiffs raise a colorable question as to the authority of the Director to curtail ground water, that issue should first be presented in an administrative hearing rather than this Declaratory Judgment action.

C. Exhaustion Of Administrative Remedies Is A Jurisdictional Prerequisite

"Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *American Falls,* 154 P.3d at 440. A plaintiff's failure to exhaust administrative remedies "deprive[s] the district court of subject matter jurisdiction." *Regan v. Kootenai County*, 140 Idaho 721, 726, 100 P.3d 615, 620 (2004); *see also Owsley*, 141 Idaho at 134, 100 P.3d at 461 ("a district court does not acquire subject matter jurisdiction until all administrative remedies have been exhausted") (internal quotation marks and citation omitted). "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Regan*, 140 Idaho at 618, 100 P.3d at 724. Furthermore, the exhaustion doctrine "generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Id.* Thus, "[i]f a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted." *White v. Bannock County Comm'rs,* 139 Idaho 396, 401, 80 P.3d 332, 337 (2003).

In this case, Plaintiffs filed this declaratory judgment action after receiving notice that IDWR intended to issue curtailment orders. As the Supreme Court has heldhistorically, a party is not entitled "to seek declaratory relief until administrative remedies have been exhausted, unless the party is challenging a rule's facial constitutionality." *American Falls,* 154 P.3d at 441, *see also Regan*, 140 Idaho at 725, 100 P.3d at 619 ("[a]ctions for declaratory judgment are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted.") and *V-1 Oil Company v. County of Bannock,* 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976) (same). Instead of filing the declaratory judgment action, Plaintiffs should have pursued the administrative hearing they previously requested pursuant to the provisions of I.C. § 42-1701A(3). Plaintiffs allege in Count II that the Spring Users' water rights are subordinate to the Plaintiffs' ground water rights. Count III of the Complaint alleges that there is no guarantee that the Director's intended curtailment of the Plaintiffs' water rights will increase discharges for

a particular spring. Count IV alleges that the Spring Users water rights are supplied by waste water. Count V contends that no reasonable pumping level has been established. Count VI of Plaintiffs' Complaint alleges that the diversion measures are unreasonable. Count VII alleges that the delivery calls are futile. All of these substantive allegations concern affirmative defenses to the curtailment orders and issues of fact that should first be considered in an administrative proceeding before the Director. *American Falls*, 154 P.3d at 440.

While Count VIII of the Complaint alleges that Plaintiffs have "repeatedly requested yet have been deprived by IDWR of a hearing on the 2005 Orders," Complaint at 17 ¶ 76, these claims are belied by the record. The 2005 Orders were put on hold as a result of the *American Falls* litigation that was appealed to the Idaho Supreme Court. Because the district court held the Department's Rules for Conjunctive Management of Surface and Ground Water Resources facially unconstitutional, and denied the Director's request for a stay of the decision, a hearing could not be given to Plaintiffs until the decision was decided on appeal. As this Court is aware, it was only in March of 2007, that the Idaho Supreme Court overturned the district court decision, which now clears the way for administrative hearings.

IDWR should be afforded an opportunity to consider the Plaintiffs' arguments and address any alleged errors before the Plaintiffs are allowed to seek judicial intervention. This is particularly true when the Plaintiffs' claim challenges IDWR's determinations regarding the amount of discharge accruing to spring reaches for the benefit of particular springs (Count III), reasonable pumping levels (Count V), or diversion measures (Count VI). These determinations are squarely "within [the Department's] area of specialization and the administrative remedy is as likely as the judicial remedy to provide the wanted relief." *Regan*, 140 Idaho at 726, 100 P.3d at 620 (internal quotation marks omitted). Only after a "final order" is issued in a contested case may the aggrieved party seek judicial review. *See* IDAPA 37.01.01.790 (The regulation also incorporates the statutory exhaustion requirement of the Idaho Administrative Procedure Act.); *see also* Idaho Code § 67-5271(1) ("[a] person is not entitled to judicial review of an agency

action until that person has exhausted all administrative remedies required in this chapter.") and *American Falls*, 154 P.3d at 441 ("The Idaho Administrative Procedure Act (IDAPA) provides that '[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.'")

Clearly, opportunities remain for the Plaintiffs to obtain the relief they seek in an administrative proceeding before IDWR; thereby avoiding or reducing the need for judicial review. Therefore, dismissal for lack of subject matter jurisdiction is appropriate because the Plaintiffs have failed to exhaust their administrative remedies. *Regan*, 140 Idaho at 726, 100 P.3d at 620; *White*, 139 Idaho at 401, 80 P.3d at 337.

D. Dismissal Of The Proceeding Is Consistent With Public Policy Considerations

Moreover, dismissal serves the policies of the exhaustion doctrine:

> [I]mportant policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative process established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

Regan, 140 Idaho at 725, 100 P.3d at 619.

The Department is charged with administering Idaho water rights "in accordance with the prior appropriation doctrine." Idaho Code § 42-602. This means that the Department must protect the priority of rights in accordance with the prior appropriation doctrine.

Fulfilling Idaho's constitutional and statutory directives regarding priority, maximum/optimal utilization, and beneficial use—which are sometimes in tension—often requires IDWR to engage in a complicated and inherently fact-bound inquiry. This is particularly true when, as in this case, Plaintiffs are questioning the reasonableness of diversions and pumping levels for ground water, or whether curtailment will affect the amount of discharge in a particular spring. *See* Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND &

WATER LAW REV. 63 (1987) ("The management of hydrologically connected surface water and groundwater under the appropriation doctrine is widely acknowledged to be complicated.")

Conjunctive administration plainly is "peculiarly within [IDWR's] specialized field." *Grever v. Idaho Tel. Co.*, 94 Idaho 900, 902, 499 P.2d 1256, 1258 (1972) (citation and internal quotation marks omitted). Accordingly, requiring Plaintiffs to exhaust their administrative remedies not only is required by the letter of the exhaustion rule, but also promotes the policies underlying the rule.

E. The Case Should Be Dismissed Under the Doctrine Of Primary Jurisdiction

Requiring the Plaintiffs to exhaust administrative remedies is especially appropriate in this case because the Department has primary jurisdiction over the subject matter at issue. The subject matter of this action—and the contested case—is the conjunctive administration of senior surface water rights and junior ground water rights. The Department is statutorily vested with jurisdiction over this factually and legally complex subject, which is squarely within the Department's specialized field of regulation and expertise. Idaho law therefore requires that the Department be allowed to make the initial findings and determinations on the Plaintiffs' claims before a court takes up the matter. Accordingly, this action also should be dismissed on primary jurisdiction grounds.

1. <u>The Doctrine Of Primary Jurisdiction Is Distinct From Exhaustion In Operation And Policy.</u>

Under the doctrine of primary jurisdiction, a court should dismiss an action "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Western Pacific*, 352 U.S. at 64. The Idaho Supreme Court has explained the doctrine as follows:

> The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. The doctrine of primary jurisdiction is not an inflexible mandate but rather is predicated on an attitude of judicial self-restraint, and is generally applied when the court believes that considerations of policy recommend that the issue be left to the administrative agency for initial determination.

Grever, 94 Idaho at 902, 499 P.2d at 1258 (internal quotation marks and footnotes omitted). Primary jurisdiction thus concerns whether, as a matter of policy, the initial determination should be made by an agency. The doctrine therefore differs from the requirement of exhaustion of administrative remedies:

> [Primary jurisdiction] is not a doctrine that governs judicial review of administrative action. In this important respect, it is altogether different from the doctrines of exhaustion and of ripeness, which govern the timing of judicial review of administrative action. The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.
>
> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.
>
> The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will Initially [sic] decide a particular issue, not the question whether court or agency will Finally [sic] decide the issue . . . Especially felicitous is the language of a district court that the question is merely one of 'priority of jurisdiction.'

Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978) (quoting 3 K. Davis, Administrative Law Treatise § 19.01, p. 1-3 (1958)) (ellipses in *Sierra Life*); *see also White*, 139 Idaho at 401, 80 P.3d at 337 (contrasting exhaustion and primary jurisdiction).

The primary jurisdiction doctrine is motivated by considerations of promoting coordination of courts and agencies and uniformity of regulation by "taking into account what the agency has to offer":

> The principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts. Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements.

Grever, 94 Idaho at 902, 499 P.2d at 1258 (quoting 3 K. Davis, Administrative Law Treatise § 19.01, p. 5, n.7) (footnote omitted). The United States Supreme Court has explained the

purposes underlying the primary jurisdiction doctrine in similar terms, citing the "desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions." *Western Pacific*, 352 U.S. at 64.

2. IDWR Has Primary Jurisdiction Over the Subject Matter Of This Case Under The Grever Analysis.

In *Grever*, the Idaho Supreme Court cited three factors in holding that the Idaho Public Utilities Commission had primary jurisdiction: (1) the commission had been "vested with jurisdiction to regulate and supervise public utilities," (2) the commission had been "given the power to prescribe rules and regulations for the performance of any service or the furnishing of any commodity supplied by a public utility," and (3) the commission had a "duty . . . to assure that adequate service is furnished." *Grever*, 94 Idaho at 902, 499 P.2d at 1258 (footnotes and internal quotation marks omitted).

Application of the *Grever* elements of primary jurisdiction demonstrates that the Department should be deemed to have primary jurisdiction in this case. The policies and purposes served by the doctrine of primary jurisdiction also weigh in favor of IDWR's primary jurisdiction.

a. The First *Grever* Element Is Satisfied Because IDWR Is Statutorily Vested With Jurisdiction Over Water Rights Administration.

The first *Grever* element is satisfied if the agency is "vested with jurisdiction to regulate and supervise" the subject matter. *Id.* The subject of this litigation is the administration of water rights in the Water Districts Nos. 120, 130, and 140 — specifically, the distribution and delivery of water pursuant to a senior surface appropriator's delivery call against junior ground water appropriators.[3] Complaint at 5 ¶ 15. The Director is statutorily vested with jurisdiction to supervise and regulate the distribution of water from all natural sources in water districts:

[3] The curtailment warning letters sent by the Director on April 30, 2007, affected ground water right holders in Water District No. 130 only.

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

Idaho Code § 42-602. In addition, the Director also has statutory authority "[t]o supervise and control the exercise and administration of all rights to the use of ground waters," Idaho Code § 42-237a(g).

Since the Director is statutorily vested with jurisdiction over the administration of the water rights at issue in this case, the first *Grever* element is satisfied.

b. The Second *Grever* Element Is Satisfied Because IDWR Is Authorized To Promulgate Regulations As To Water Rights Administration.

The second *Grever* element looks to whether the agency has been "given the power to prescribe rules and regulations" regarding the subject matter. *Grever*, 94 Idaho at 902, 499 P.2d at 1258. Idaho statutes expressly grant the Director authority to promulgate rules and regulations regarding the administration of water rights:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.

Idaho Code § 42-603. The regulatory authority conferred under Idaho Code § 42-603 plainly satisfies the second *Grever* element.

c. The Third *Grever* Element Is Satisfied Because IDWR Has A Statutory Duty To Administer Water Rights In Accordance With The Prior Appropriation Doctrine As Established By Idaho Law.

The third *Grever* element is satisfied if the Director has a duty to assure the administration of water rights in accordance with the prior appropriation doctrine as established by Idaho law. *See Grever*, 94 Idaho at 902, 499 P.2d at 1258 (stating same with regard to the furnishing of utility service). Idaho statutes impose just such a duty on the Director.

> It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

Idaho Code § 42-231. "The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine." Idaho Code § 42-602.

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply;

Idaho Code § 42-607 (emphasis added). Thus, by statute, the Director is to administer the surface and ground water rights in this case in accordance with the prior appropriation doctrine as established by Idaho law. This fact satisfies the third *Grever* element for application of the doctrine of primary jurisdiction.

Since the three *Grever* elements are satisfied, it follows that IDWR has primary jurisdiction over the water rights administration matters that are the subject of this litigation. *See Grever*, 94 Idaho at 902, 499 P.2d at 1258 (reciting the three elements and concluding that the public utilities commission "has primary jurisdiction in matters such as the case at bar").

3. The Policies And Purposes Motivating The Primary Jurisdiction Doctrine Weigh In Favor Of Allowing IDWR To Make The Initial Determinations In This Case.

The policies and purposes underlying the primary jurisdiction doctrine also weigh in favor of recognizing IDWR as having primary jurisdiction in this case. The *Grever* court stated that "[t]he principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and courts" and cautioned against acting on a matter "peculiarly within the agency's specialized field without taking into account what the agency has to offer." *Grever*, 94 Idaho at 902, 499 P.2d at 1258 (quoting 3 K. Davis, Administrative Law Treatise § 19.01, p. 2, n.7) (footnote omitted).

The United States Supreme Court similarly held that "agencies created by Congress for regulating the subject matter should not be passed over." *Western Pacific*, 352 U.S. at 64 (internal quotation marks and citation omitted). "[O]therwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements." *Grever*, 94 Idaho at 902, 499 P.2d at 1258 (quoting Davis); *see also Western Pacific*, 352 U.S. at 64 (regarding "[u]niformity and consistency in the regulation of business") (internal quotation marks and citation omitted).

As previously discussed, the application of the prior appropriation doctrine as established by Idaho law in a conjunctive administration case such as this requires extensive and complicated fact-finding. IDWR is "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Western Pacific*, 352 U.S. at 65 (internal quotation marks and citation omitted). Conjunctive administration of surface and ground water rights is "peculiarly within [IDWR's] specialized field." *Grever*, 94 Idaho at 902, 499 P.2d at 1258 (internal quotation marks and citation omitted).

Therefore, recognizing IDWR's primary jurisdiction in this matter would promote the orderly and sensible coordination of the work of IDWR and this Court precisely because the administration of water rights is peculiarly within IDWR's specialized field.

F. The Doctrines of Exhaustion and Primary Jurisdiction Apply Even Though The Plaintiffs Have Styled This Case A Declaratory Judgment/Writ of Prohibition Action

The fact that the Plaintiffs seek a declaratory judgment does not bar application of the doctrines of exhaustion and primary jurisdiction. Idaho law is clear that these doctrines apply when the substance of a claim amounts to a request for judicial review of an ongoing agency proceeding, regardless of the form of the pleading in which the request is made. Exhaustion and primary jurisdiction apply in this case because the substance of the allegations and prayer for relief is a request for judicial review of the Director's orders in the contested case.

1. The Substance Of A Claim, Not Its Form, Determines Whether The Doctrines of Exhaustion And Primary Jurisdiction Apply.

In Idaho, a plaintiff may not circumvent statutorily-prescribed procedures and remedies by filing a declaratory judgment action that amounts to an appeal from an agency proceeding. The Idaho Supreme Court made this principle clear in *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

In *Bone*, the defendant city denied a landowner's application for a re-zone of his property. 107 Idaho at 845-46, 693 P.2d at 1047-48. Rather than resorting to the statutorily-prescribed judicial review procedures, the landowner filed an action for declaratory relief and a writ of mandamus to force enactment of a zoning ordinance conforming to the city's comprehensive plan, as required by Idaho Code § 67-6511. *Bone*, 107 Idaho at 846, 693 P.2d at 1048. The Idaho Supreme Court held that the declaratory judgment action was in reality an appeal of the re-zone denial and should have been handled as such:

> Mr. Bone contends that, notwithstanding § 67-5215(b-g), he can seek a declaratory judgment interpreting the statute and a writ of mandamus requiring the City to comply with the statute as interpreted. His reason is that he is not appealing his zoning decision but rather seeking an interpretation of the statute. Such an argument exalts form over substance. The fact is that Mr. Bone applied for a rezoning. The City denied his application, and because his application was denied, he subsequently appealed to the district court. Simply because Mr. Bone's theory in appealing his rezone application is that § 67-6511 entitles him to the rezone does not mean that he is not appealing the City's decision. Accordingly, his appeal should have been reviewed under § 67-5215(b-g)'s guidelines.

Bone, 107 Idaho at 849, 693 P.2d at 1051 (emphasis added).

In *White v. Bannock County Comm'rs*, the Idaho Supreme Court made it clear that the *Bone* analysis applies to exhaustion cases. *See White*, 139 Idaho at 401, 80 P.3d at 337 ("As in *Bone*, White attempted to appeal the [Planning] Council's decision on the CUP other than through the statutory administrative procedures.") In *Regan v. Kootenai County*, the court also relied on *Bone*:

> In *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984), this Court concluded that Bone had improperly bypassed the exclusive source of appeal for adverse zoning decisions by seeking a declaratory judgment and writ of mandamus. Similarly, the Regans have attempted to bypass the administrative process for reviewing the Planning Director's interpretation of the Kootenai County zoning ordinance. While the Regans' complaint for declaratory relief sought an interpretation of the zoning ordinance rather than judicial review of the Planning Director's interpretation, such a distinction 'exalts form over substance.' *See Bone*, 107 Idaho at 849, 693 P.2d at 1051. . . . Essentially, the Regans' complaint sought declaratory relief from the Planning Director's interpretation of the zoning ordinance. This issue should have been pursued before the Kootenai County zoning authorities under the procedures of the County's administrative appeal ordinance and the Local Land Use Planning Act, and not by the district court through declaratory relief.

Regan, 140 Idaho at 725-26, 100 P.3d at 619-20.

The Idaho Supreme Court has also applied *Bone*'s admonition against exalting form over substance in primary jurisdiction cases. In *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 586 P.2d 1068 (1978), the court looked to both the "essence and form" of the complaints in considering whether primary jurisdiction applied. *Sierra*, 99 Idaho at 629, 586 P.2d at 1073. Similarly, in *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977), the court agreed with Lemhi's argument that "the essence of the Mountain Bell position is that Lemhi violated the contract," holding that primary jurisdiction did not apply because it was "apparent that the dispute . . . stems initially from the language of the Traffic Agreement." *Lemhi Tel. Co.*, 98 Idaho at 695-96, 571 P.2d at 756-57.

These cases establish that it is the essential nature of the claim, not superficial pleading, that determines whether exhaustion and primary jurisdiction operate. Were it otherwise, these doctrines would be easily circumvented by artful pleading and rendered meaningless, as the United States Supreme Court observed in *United States v. Western Pacific R.R. Co*:

> And the mere fact that the issue is phrased in one instance as a matter of tariff construction and in the other as a matter of reasonableness should not be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader.

Western Pacific, 352 U.S. 59, 68-69 (1956) (emphasis added) (footnote omitted).

It follows that Plaintiffs' characterization of this proceeding as a declaratory judgment action does not control the questions of exhaustion and primary jurisdiction. Rather, the Court must look to the substance of the Plaintiffs' allegations and prayer for relief. This action thus should be dismissed if it is, in substance, an appeal from an agency proceeding.

THE DEFENDANTS SHOULD BE AWARDED REASONABLE ATTORNEY FEES AND COSTS

As a direct and proximate result of Plaintiffs' actions in filing this matter, IDWR has been required to expend legal resources and have also incurred various costs. Therefore, IDWR requests attorneys' fees and costs under Idaho Code § 12-117 because Plaintiffs have acted without any reasonable basis in law or fact. Plaintiffs' filing of this action without concluding the administrative proceeding they requested was unreasonable. Thus, attorneys' fees and costs should be awarded to the Defendants.

CONCLUSION

The Defendants respectfully urge this Court to deny Plaintiffs' request for injunctive relief. While the threatened curtailment of junior priority ground water rights to satisfy senior priority rights will result in adverse effects upon the Plaintiffs' members, that is the nature of the administration of water rights under the prior appropriation doctrine in Idaho. Further, the Court should dismiss this case for lack of subject matter jurisdiction because the Plaintiffs have failed to exhaust their administrative remedies in IDWR proceedings. Application of the exhaustion requirement is especially appropriate because the subject matter of the Plaintiffs' claims falls under IDWR's primary jurisdiction. The conjunctive administration of surface and ground water rights is a subject peculiarly within IDWR's specialized field and dismissal would promote the orderly and sensible coordination of the work of IDWR and the courts. The doctrines of exhaustion and primary jurisdiction require dismissal even though the Plaintiffs have styled this

case as a declaratory judgment action, because the substance of the Plaintiffs' claims is an appeal for judicial review of an ongoing agency proceeding.

DATED this 22nd day of May, 2007.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General

Phillip J. Rassier

PHILLIP J. RASSIER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May 2007, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS** on the following parties by the indicated methods:

Randall C. Budge
Candice M. McHugh
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EXHIBIT "D"

Westlaw
871 P.2d 809
125 Idaho 392, 871 P.2d 809
(Cite as: 125 Idaho 392, 871 P.2d 809)

Musser v. Higginson
Idaho,1994.

Supreme Court of Idaho,
Boise, February 1994 Term..
In re the General Adjudication of Rights to the Use of Water from the Snake River Drainage Basin Water System.
Alvin MUSSER; Tim Musser; and Howard "Butch" Morris, Petitioners-Respondents,
v.
R. Keith HIGGINSON, in his official capacity as *Director of the Idaho Department of Water* Resources and the Idaho Department of Water Resources, Respondents-Appellants.
No. 20807.

Feb. 28, 1994.
Rehearing Denied April 22, 1994.

Landowners brought mandamus proceeding, to compel director of department of water resources to discharge statutorily mandated obligation to exercise laws relative to distribution of water in accordance with rights of prior appropriation. The District Court, Twin Falls County, Daniel C. Hurlbutt, Jr., J., issued writ and awarded attorney fees, and appeal was taken. The Supreme Court, Johnson, J., held that: (1) mandamus was appropriate, as director had no discretion regarding carrying out of law and other remedies were ineffective; (2) trial court had discretion to award attorney fees, and (3) fees could not be paid out of special adjudication fund covering water allocation disputes.

Affirmed.
West Headnotes
[1] Mandamus 250 ⇨72

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k72 k. Matters of Discretion. Most Cited Cases
Fact that certain details are left to discretion of authorities does not prevent relief by mandamus.

[2] Mandamus 250 ⇨73(1)

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k73 Specific Acts
250k73(1) k. In General. Most Cited Cases
Writ of mandamus could be issued to compel director of state department of water resources to deliver full decreed water rights to landowners and to control distribution of water from aquifer according to priority date of decreed water rights; director was under statutory obligation to execute laws relative to distribution of water in accordance with rights of prior appropriation, there were no applicable administrative procedures which could be invoked, and monetary damages provided landowners with inadequate relief. I.C. §§ 6-904, 42-237e, 42-602, 42-1701A.

[3] Costs 102 ⇨194.12

102 Costs
102VIII Attorney Fees
102k194.12 k. Discretion of Court. Most Cited Cases
In those instances in which attorney fees can properly be awarded, award rests in sound discretion of trial court and burden is on person disputing award to show abuse.

[4] Mandamus 250 ⇨190

250 *Mandamus*
250III Jurisdiction, Proceedings, and Relief
250k190 k. Costs. Most Cited Cases
Landowners who brought successful mandamus proceeding, to compel director of state department of water resources to discharge statutory responsibility to deliver decreed water rights and

control distribution of water from aquifer according to priority date of water rights, was entitled to attorney fees; there was no reasonable basis in law or fact for director's refusal to comply with statutory mandate. I.C. §§ 12-117(1), 42-602.

[5] Mandamus 250 ⇐190

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k190 k. Costs. Most Cited Cases
Attorney fee award made to landowners, who had successfully brought mandamus action to compel director of water resources department to discharge his statutorily mandated obligations to execute laws relative to distribution of water in accordance with rights of prior appropriation, could not be paid out of special adjudication account set aside for the payment of costs attributable to water rights adjudications. I.C. §§ 12-117(3), 42-1777.

****810 *393** Larry EchoHawk, Atty. Gen., and Clive J. Strong, Phillip J. Rassier and Peter R. Anderson, Deputy Attys. Gen., for respondents-appellants. Peter R. Anderson argued.
Hepworth, Nungester & Lezamiz, Chtd., Twin Falls, for petitioners-respondents. John C. Hohnhorst argued.
JOHNSON, Justice.
This case is a water distribution case. The primary issue presented is whether the trial court properly issued a writ of mandate ordering the director (the director) of the Idaho department of water resources (the department) immediately to comply with I.C. § 42-602 and distribute water in accordance with the doctrine of prior appropriation. There are also issues concerning the award of attorney fees and the trial court's order prohibiting the payment of these attorney fees and costs from the Snake River Basin Adjudication account (SRBA account).

We affirm the trial court's issuance of the writ of mandate, its award of attorney fees, and the order prohibiting the payment of attorney fees and costs awarded from the SRBA account.

Alvin and Tim Musser own real property (the Mussers' property) in Gooding County, ****811 *394** Idaho, which has appurtenant to it a decreed right for 4.8 cubic feet per second (cfs) of water from the Martin-Curran Tunnel (the tunnel) with a priority date of April 1, 1892. Howard "Butch" Morris leases the Mussers' property together with the appurtenant water rights. In this opinion, we refer to the Mussers and Morris collectively as "the Mussers."

The Mussers' property is located within water district 36A (the district). The district is served by a watermaster (the watermaster) appointed by the director. The springs which supply the Mussers' water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer (the aquifer).

In the spring of 1993, the Mussers found that the tunnel did not supply them with sufficient water to fulfill their adjudicated water rights. As a result, they contend they planted less acreage than they had previously and that many of their crops were lost and damaged.

On May 25, 1993, other owners of water rights from the tunnel demanded that the watermaster deliver water to them. The watermaster relayed the demand to the director who rejected the demand. On June 16, 1993, the Mussers made a similar demand on the director for the "full and immediate delivery of their decreed water rights from the Curran Tunnel." The director denied the demand on the grounds that "the director is not authorized to direct the watermaster to conjunctively administer ground and surface water within Water District 36A short of a formal hydrologic determination that such conjunctive management is appropriate."

The Mussers sought a writ of mandate to compel the director: (1) to deliver their full decreed water rights, and (2) to control the distribution of water from the aquifer according to the priority date of the decreed water rights.

The director and the department moved to dismiss the Mussers' request for a writ of mandate, arguing

that the request was moot because after the Mussers initiated the action, the director issued a notice of intent to promulgate rules and a notice and order for a contested case. The proposed rules would allow the director to respond to the Mussers' demands by providing for the conjunctive management of the aquifer and the Snake River. The contested case would provide a forum for determining how to deliver the Mussers' water pending completion of the proposed rules. Alternatively, the director and the department contended the petition should be dismissed because a writ of mandate is an inappropriate method by which to litigate the relationship between senior and junior ground water rights.

The trial court denied the motion to dismiss and concluded that the director owes the Mussers "a clear legal duty to distribute water under the prior appropriation doctrine." The trial court determined that the director's failure to adopt rules and regulations enabling him to respond to the Mussers' demand for delivery of their water was a breach of his "mandatory, ministerial duty." The trial court also said the director's refusal to honor the Mussers' demand was "arbitrary and capricious" and that the Mussers had no "adequate, plain or speedy remedy at law."

The trial court issued a writ of mandate commanding the director "to immediately comply with I.C. § 42-602 and distribute water in accordance with the Constitution of the State of Idaho and the laws of this state commonly referred to as the Doctrine of Prior Appropriation...." The director and the department appealed and asked the trial court to stay the writ during the appeal. The trial court denied the motion to stay, noting: "I don't see what there is in the writ of mandate that needs to be stayed since the department is proceeding to honor it in its entirety." This Court also denied the request of the director and the department to stay the writ during this appeal.

The Mussers sought attorney fees in the trial court pursuant to I.C. §§ 12-117 and 12-121 and the private attorney general doctrine. The trial court concluded that the director and the department acted without a reasonable basis in fact or law and defended the action frivolously, unreasonably and without foundation and that the Mussers were compelled to pursue private enforcement "to ****812** ***395** require the director to perform a duty that is clear, unambiguous and constitutionally required." The trial court ruled that the Mussers are entitled to fees under all three of the theories advanced, and ordered that the costs and fees not be paid out of the SRBA account, pursuant to I.C. § 12-117(3). The director and the department appealed.

The director and the department assert that the trial court should not have issued the writ of mandate. We disagree.

In *Idaho Falls Redev. Agency v. Countryman,* 118 Idaho 43, 794 P.2d 632 (1990), the Court recapitulated the requirements for the issuance of a writ of mandate:

> In *Utah Power & Light Co. v. Campbell,* 108 Idaho 950, 953, 703 P.2d 714, 717 (1985), this Court stated that "[m]andamus will lie if the officer against whom the writ is brought has a 'clear legal duty' to perform the desired act, and if the act sought to be compelled is ministerial or executive in nature." Existence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent issuance of a writ, and the party seeking the writ must prove that no such remedy exists. This Court has repeatedly held that mandamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. Likewise, Idaho law requires that a writ must be issued in those cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.

Id. at 44, 794 P.2d at 633 (citations omitted).

I.C. § 42-602 provides:

> It shall be the duty of the director of the department of water resources to have *immediate direction and control* of the *distribution of water* from all of the

streams, rivers, lakes, ground water and other natural water sources in this state to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water shall be accomplished either (1) *by watermasters* appointed as provided in this chapter and supervised by the director; *or* (2) *directly by employees of the department* of water resources under authority of the director in those areas of the state not constituted into water districts as provided in this chapter. *The director must execute the laws relative to the distribution of water in accordance with rights of prior appropriation as provided in section 42-106, Idaho Code.*
The director of the department of water resources shall, in the distribution of water from the streams, rivers, lakes, ground water and other natural water sources, be governed by this title.

I.C. § 42-602 (emphasis added).

We conclude that the director's duty to distribute water pursuant to this statute is a clear legal duty. The director himself testified that he was aware that his duty to deliver water under *I.C. § 42-602* is mandatory.

[1] The director contends, however, that although his duty under I.C. § 42-602 is mandatory, the statute leaves to the director's discretion the means that will be used to respond to calls for water. For more than three-quarters of a century, the Court has adhered to the following principle: "The fact that certain details are left to the discretion of the authorities does not prevent relief by *mandamus*." *Beem v. Davis,* 31 Idaho 730, 736, 175 P. 959, 961 (1918) (emphasis in original). *See also Moerder v. City of Moscow,* 74 Idaho 410, 415, 263 P.2d 993, 998 (1953) ("Public officials may, under some circumstances, be compelled by writ of mandate to perform their official duties, although the details of such performance are left to their discretion.")

[2] This principle applies to this case. The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water.

****813 *396** The director defended his refusal to honor the Mussers' demand by claiming that a "policy" of the department prevented him from taking action. In his testimony at the hearing to consider whether the writ would issue, the director referred to I.C. § 42-226 and stated that "a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource."

We note that the original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess.Laws, ch. 200, § 1, p. 423. Both the original version and the current statute make it clear that *this statute does not affect rights to the use of* ground water acquired before the enactment of the statute. Therefore, we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.

The Mussers presented evidence indicating that suing the director for damages was not a plain, adequate, and speedy remedy in the ordinary course of law because of the ongoing nature of the harm and the difficulty in determining the damages they would incur due to the director's refusal to comply with I.C. § 42-602. The Mussers also contended that suing the director was inadequate because of the director's immunity from damages under I.C. § 6-904, a portion of the Idaho tort claims act.

The director and the department contend that the Mussers could have pursued administrative hearings before the director, administrative appeals, and motions for interim administration of water rights. We note that the only manner in which any of these asserted remedies were presented to the trial court was in the final argument by the attorney for the director and the department at the hearing concerning the request for the writ. There, the attorney argued that the Mussers should seek a hearing and then judicial review pursuant to I.C. §§ 42-237e and 42-1701A. Because these were the

only alternative remedies presented to the trial court, these are the only ones we will address.

I.C. § 42-237e states:
Any person dissatisfied with any decision, determination, order or action of the director of the department of water resources.... made pursuant to this act may, if a hearing on the matter already has been held, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If a hearing has not been held, any person aggrieved by the action of the director.... may contest such action pursuant to section 42-1701A(3), Idaho Code.

By its terms, I.C. § 42-1701A(3) applies only to "any applicant for any permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director." I.C. § 42-1701A(3) concludes: "Judicial review of any final order of the director issued following the hearing may be had pursuant to subsection (4) of this section." These provisions do not apply to the circumstances presented in this case. The Mussers did not seek a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director. Therefore, these remedies are not available to the Mussers to obtain review of the director's refusal to comply with I.C. § 42-602.

[3][4] The director and the department assert that the trial court should not have awarded attorney fees to the Mussers and should not have ordered that the fees and costs not be paid from the SRBA account. We conclude that the trial court did not abuse its discretion in awarding attorney fees pursuant to I.C. § 12-117 and in ordering that the fees and costs not be paid from the SRBA account, pursuant to I.C. § 12-117(3).

I.C. § 12-117(1) provides, in part:
In any administrative or civil judicial proceeding involving as adverse parties a state agency and a person, the court shall ****814** ***397** award the person reasonable attorney's fees, witness fees and reasonable expenses, if the court finds in favor of the person and also finds that the state agency acted without a reasonable basis in fact or law.

In awarding attorney fees and costs, the trial court concluded that by rejecting the Mussers' request to perform the duties mandated by I.C. § 42-602, the director acted without any reasonable basis in fact or law.

Recently, we have reiterated the standard by which we review the award of attorney fees:
In those instances wherein attorney fees can properly be awarded, the award rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion.

Fox v. Board of County Com'rs, 121 Idaho 684, 685, 827 P.2d 697, 698 (1992).

Applying the three-step analysis of *Sun Valley Shopping Ctr. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991), we conclude that the trial court did not abuse its discretion in awarding attorney fees pursuant to I.C. § 12-117. The trial court correctly perceived the award to be a discretionary act, acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the consideration of an award, and reached its decision by an exercise of discretion. We agree with the trial court that there was no reasonable basis in law or fact for the director's refusal to comply with I.C. § 42-602.

[5] Citing I.C. § 12-117(3), the trial court ordered that the attorney fees and costs awarded to the Mussers not be paid out of the SRBA adjudication account. I.C. § 12-117(3) provides: "Expenses awarded under this section shall be paid from funds in the regular operating budget of the state agency." The adjudication account is created under § 42-1777. This statute limits the use by the department of money in the account, "upon appropriation by the legislature, to pay the costs of the department attributable to general water rights adjudications conducted pursuant to chapter 14, title 42, Idaho Code."

The attorney fees and costs awarded to the Mussers were not costs of the department attributable to a general water rights adjudication. The Court has recently reiterated that the purpose of an award pursuant to I.C. § 12-117 is to deter groundless or arbitrary agency action and to provide a remedy for persons who have borne unfair and unjustified financial burdens attempting to correct mistakes agencies should never have made. *Lockhart v. Department of Fish and Game,* 121 Idaho 894, 898, 828 P.2d 1299, 1303 (1992). Treating the trial court's award as costs of the department under I.C. § 42-1777 is inconsistent with this purpose.

Because we affirm the award of attorney fees pursuant to I.C. § 12-117, we find it unnecessary to address the other bases for the award stated by the trial court.

We affirm the trial court's issuance of the writ of mandate, award of attorney fees and costs, and order that the attorney fees and costs not be paid out of the SRBA account.

We award the Mussers costs on appeal. We also award the Mussers attorney fees on appeal pursuant to I.C. § 12-117.

McDEVITT, C.J., and BISTLINE, TROUT and SILAK, JJ., concur.
Idaho,1994.
Musser v. Higginson
125 Idaho 392, 871 P.2d 809

END OF DOCUMENT

EXHIBIT "E"

H

American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources
Idaho,2007.

Supreme Court of Idaho,
Boise, December 2006 Term.
AMERICAN FALLS RESERVOIR DISTRICT NO. 2, A & B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, and Twin Falls Canal Company, Plaintiffs-Respondents-Cross Appellants,
andRangen, Inc., Clear Springs Foods, Inc., Thousand Springs Water Users Association, and Idaho Power Company, Interveners-Respondents-Cross Appellants,
v.
The IDAHO DEPARTMENT OF WATER RESOURCES and Karl J. Dreher, its Director, Defendants-Appellants-Cross-Respondents,
andIdaho Ground Water Appropriators, Inc., Intervener.
Nos. 33249, 33311, 33399.

March 5, 2007.
Rehearing Denied Aug. 30, 2007.

Background: Reservoir district, irrigation districts, canal company, surface water rights owners, and holders of storage contracts brought action against Department of Water Resources and its director for declaratory judgment that Rules for Conjunctive Management of Surface and Ground Water Resources were unconstitutional. The Fifth Judicial District Court, Gooding County, R. Barry Wood, J., entered summary judgment in favor of plaintiffs. Appeal and cross-appeal were taken.

Holdings: The Supreme Court, Trout, J., held that:

(1) District Court should not have engaged in an analysis of the constitutionality of the Rules "as applied" before administrative remedies were exhausted, and

(2) as a matter of first impression, the Rules are not facially unconstitutional.

Affirmed in part and reversed in part.

West Headnotes

[1] Appeal and Error 30 ⇨863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment.

[2] Appeal and Error 30 ⇨934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

On review of a summary judgment, the Supreme Court must liberally construe facts in the existing record in favor of the nonmoving party and draw all reasonable inferences from the record in favor of the nonmoving party.

[3] Judgment 228 ⇨185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or Non-Existence of Fact Issue. Most Cited Cases

Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law. Rules Civ.Proc., Rule 56.

[4] Judgment 228 ⇐185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or Non-Existence of Fact Issue. Most Cited Cases
If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied. Rules Civ.Proc., Rule 56.

[5] Appeal and Error 30 ⇐842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases
The constitutionality of a statute or administrative regulation is a question of law over which Supreme Court exercises free review.

[6] Administrative Law and Procedure 15A ⇐391

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak391 k. Determination of Validity; Presumptions. Most Cited Cases

Constitutional Law 92 ⇐990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))

Constitutional Law 92 ⇐1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases
(Formerly 92k48(1))
A presumption exists in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers.

[7] Constitutional Law 92 ⇐990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))
An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality.

[8] Constitutional Law 92 ⇐996

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, Positively, or Unmistakably Unconstitutional. Most Cited Cases
(Formerly 92k48(1))

The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

[9] Administrative Law and Procedure 15A ⇐ 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy exhausted before the courts will act.

[10] Constitutional Law 92 ⇐983

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k983 k. Exhaustion of Other Remedies. Most Cited Cases
(Formerly 92k46(1))
District court should not have engaged in an analysis of the constitutionality of the Rules for Conjunctive Management of Surface and Ground Water Resources "as applied" to the facts of case before administrative remedies were exhausted. IDAPA 37.03.11.001 et seq.

[11] Constitutional Law 92 ⇐656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases
(Formerly 92k38)

Constitutional Law 92 ⇐657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
(Formerly 92k38)
A party may challenge a statute as unconstitutional on its face or as applied to the party's conduct.

[12] Constitutional Law 92 ⇐963

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k963 k. Questions of Law or Fact. Most Cited Cases
(Formerly 92k45)
A facial challenge to the constitutionality of a statute or rule is purely a question of law.

[13] Constitutional Law 92 ⇐656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases
(Formerly 92k38)

Constitutional Law 92 ⇐657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
(Formerly 92k38)
Generally, a facial constitutional challenge is mutually exclusive from an as applied challenge.

[14] Constitutional Law 92 ⇐656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases
(Formerly 92k38)
For a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in all of its applications; in other words, the challenger must establish that no set of circumstances exists under which the law would be valid.

[15] Constitutional Law 92 ⇨657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
(Formerly 92k38)
To prove a statute is unconstitutional as applied, the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional.

[16] Constitutional Law 92 ⇨965

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k965 k. In General. Most Cited Cases
(Formerly 92k46(2))

Constitutional Law 92 ⇨983

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k983 k. Exhaustion of Other Remedies. Most Cited Cases
(Formerly 92k46(1))
A district court should not rule that a statute is unconstitutional as applied to a particular case until administrative proceedings have concluded and a complete record has been developed. West's I.C.A. § 67-5277.

[17] Constitutional Law 92 ⇨656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases
(Formerly 92k38)

Constitutional Law 92 ⇨657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
(Formerly 92k38)
An "on its face" constitutional analysis may not be combined with an "as applied" analysis; although a court may hear both types of challenges to a rule's constitutional validity, the court may not do a hybridized form of either test, in which the two tests are combined into a single analysis.

[18] Administrative Law and Procedure 15A ⇨229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Administrative remedies generally must be exhausted before constitutional claims are raised in

district court.

[19] Administrative Law and Procedure 15A ⇐506

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak506 k. Record. Most Cited Cases
Raising a constitutional challenge to a rule or regulation does not alleviate the necessity of establishing a complete administrative record.

[20] Declaratory Judgment 118A ⇐44

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak44 k. Statutory Remedy. Most Cited Cases
The "threatened application" language in statute which provides for standing, prior to exhausting administrative remedies, in order to seek a declaratory judgment on a rule's validity, if the rule itself or its "threatened application" interferes with, impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner, is there to permit standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge. West's I.C.A. § 67-5278.

[21] Administrative Law and Procedure 15A ⇐783

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak783 k. Constitutional Questions. Most Cited Cases

Constitutional Law 92 ⇐656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases
(Formerly 92k38)

Constitutional Law 92 ⇐657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
(Formerly 92k38)
A district court should not blur the lines between a facial and as applied challenge to constitutionality of statute, rule, or regulation by engaging in a hybrid analysis.

[22] Constitutional Law 92 ⇐983

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k983 k. Exhaustion of Other Remedies. Most Cited Cases
(Formerly 92k46(1))
There are two exceptions to the rule that an as applied analysis on constitutionality is appropriate only if all administrative remedies have been exhausted: (1)when the interests of justice so require and (2) when an agency has acted outside of its authority.

[23] Administrative Law and Procedure 15A ⇐305

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak305 k. Statutory Basis and Limitation. Most Cited Cases

To retain its authority over a controversy, an agency must be acting within the scope of the authority conferred upon it.

[24] Constitutional Law 92 ⇨983

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k983 k. Exhaustion of Other Remedies. Most Cited Cases
(Formerly 92k46(1))
Rule permitting as applied analysis on constitutionality prior to exhaustion of administrative remedies, if agency acted outside its authority, did not apply to constitutional challenge to Rules for Conjunctive Management of Surface and Ground Water Resources; determination of whether director of Department of Water Resources exceeded his authority depended on whether the Rules contradicted the constitutional provisions relating to the prior appropriation doctrine. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.001 et seq.

[25] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and Ground Water Resources are not facially unconstitutional by failing to articulate applicable burdens of proof and evidentiary standards for delivery call petitions by senior users; the Rule that requires a senior user to file a delivery call with the Director of Water Resources and allege material injury does not place the burden on the senior user to prove material injury, and requirements pertaining to standard and burden of proof are to be read into the Rules. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.020.02, 37.03.11.030.01, 37.03.11.040.01.

[26] Waters and Water Courses 405 ⇨133

405 Waters and Water Courses
405VI Appropriation and Prescription
405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases
District court's criticism of Rules for Conjunctive Management of Surface and Ground Water Resources on ground that they failed to recite burdens integral to constitutional protections for water rights was contrary to the court's obligation to seek an interpretation upholding constitutionality of the rules; the court failed to acknowledge that the constitutional standards were incorporated by Rule acknowledging all elements of the prior appropriation doctrine as established by Idaho law. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.020.02.

[27] Administrative Law and Procedure 15A ⇨229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases
Parties must generally exhaust administrative remedies before challenging a rule's constitutionality, particularly when asserting the rule is unconstitutional as applied to the facts, because a complete administrative record is necessary for such a determination. West's I.C.A. § 67-5277.

[28] Waters and Water Courses 405 ⇨133

405 Waters and Water Courses
405VI Appropriation and Prescription
405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases

Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and

Ground Water Resources are not made facially unconstitutional by the absence of any procedural time frames or specifically articulated time standards; nothing in the Rules prohibits a timely response to a delivery call for water. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.001 et seq.

[29] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
A timely response is required when a delivery call is made and water is necessary to respond to that call. West's I.C.A. Const. Art. 15, § 3.

[30] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and Ground Water Resources are not facially unconstitutional by not being more specific in defining reasonableness of water diversions; the factors for the Director of Water Resources to consider in responding to a delivery call, including material injury and efficient use of water, require some determination of reasonableness, and given the nature of the decisions in determining how to respond to a delivery call, Director needs some discretion. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.042.

[31] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and Ground Water Resources do not on their face unconstitutionally force senior water rights holders to re-adjudicate rights or fail to give adequate consideration to partial decree; responses by Director of Water Resources to senior users' delivery calls are not readjudications of rights, evaluation of reasonableness of diversion does not involve readjudication, and determination of waste also does not involve readjudication. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.42.01.

[32] Waters and Water Courses 405 ⇨133

405 Waters and Water Courses
405VI Appropriation and Prescription
405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases
Reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. IDAPA 37.03.11.42.01.

[33] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and Ground Water Resources should not be read as containing a burden-shifting provision to make the petitioner prove again or readjudicate the right which he already has; while there is no question that some information is relevant and necessary to the Director of Water Resources' determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to prove an adjudicated right. IDAPA 37.03.11.030.01.

[34] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and Ground Water Resources may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. IDAPA 37.03.11.001 et seq.

[35] Waters and Water Courses 405 ⇨140

405 Waters and Water Courses

405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Once the initial determination is made that material injury is occurring or will occur, the junior water right holder then bears the burden of proving that the senior user's delivery call would be futile or to challenge, in some other constitutionally permissible way, the senior's call. IDAPA 37.03.11.001 et seq.

[36] Waters and Water Courses 405 ⇐142

405 Waters and Water Courses
405VI Appropriation and Prescription
405k141 Nature and Extent of Rights Acquired
405k142 k. In General. Most Cited Cases
"Storage water" is water held in a reservoir and is intended to assist the holder of the water right in meeting decreed needs.

[37] Waters and Water Courses 405 ⇐243

405 Waters and Water Courses
405IX Public Water Supply
405IX(B) Irrigation and Other Agricultural Purposes
405k243 k. Storage of Water, and Reservoirs Therefor. Most Cited Cases
"Carryover" is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water.

[38] Waters and Water Courses 405 ⇐140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases

Waters and Water Courses 405 ⇐142

405 Waters and Water Courses
405VI Appropriation and Prescription
405k141 Nature and Extent of Rights Acquired
405k142 k. In General. Most Cited Cases
One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right. West's I.C.A. § 42-202.

[39] Waters and Water Courses 405 ⇐140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
Rules for Conjunctive Management of Surface and Ground Water Resources are not facially unconstitutional in permitting some discretion in the Director of Water Resources to determine whether the carryover water is reasonably necessary for future needs; permitting senior user's excessive carryover of stored water without regard to the need for it would be in itself unconstitutional. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.042.01.g.

[40] Waters and Water Courses 405 ⇐142

405 Waters and Water Courses
405VI Appropriation and Prescription
405k141 Nature and Extent of Rights Acquired
405k142 k. In General. Most Cited Cases
Neither the state constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. West's I.C.A. Const. Art. 15, § 3.

[41] Waters and Water Courses 405 ⇐140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases
A senior user may not fill entire storage water right, regardless of need to fulfill current or future needs; while the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception, and the state constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. West's I.C.A. Const. Art. 15, § 3.

[42] Eminent Domain 148 ⇐2.17(2)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.17 Waters and Water Courses; Flooding
148k2.17(2) k. Water Rights. Most Cited Cases
Conjunctive Management of Surface and Ground Water Resources rule on domestic and stock water rights is not made facially unconstitutional by failure to address compensation to senior user for the taking; the rule does not prohibit a takings claim. West's I.C.A. Const. Art. 15, § 3; IDAPA 37.03.11.020.11.

[43] Declaratory Judgment 118A ⇦306

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak306 k. New Parties. Most Cited Cases
District court did not abuse its discretion in determining that other parties adequately represented city's interests in suit on constitutionality of Rules for Conjunctive Management of Surface and Ground Water Resources and in revoking order that allowed city to intervene; after city was allowed to intervene, it moved to disqualify judge based on alleged conflict of interest known to city months earlier, and the court could conclude that city sought to intervene for the purpose of prejudicial delay and forum shopping. Rules Civ.Proc., Rule 24; IDAPA 37.03.11.001 et seq.

[44] Parties 287 ⇦38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In General. Most Cited Cases
A district court's decision to grant or deny permissive intervention is a matter of discretion. Rules Civ.Proc., Rule 24.

[45] Appeal and Error 30 ⇦946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases
In determining whether the trial court properly exercised its discretion, Supreme Court engages in a three-part inquiry to determine whether (1) the trial court correctly perceived the issue as one of discretion, (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) reached its decision by an exercise of reason.

[46] Appeal and Error 30 ⇦901

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 k. Burden of Showing Error. Most Cited Cases
The appellant carries the burden of showing that the district court committed error.

[47] Appeal and Error 30 ⇦901

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 k. Burden of Showing Error. Most Cited Cases
Error will not be presumed, but must be affirmatively shown on the record by appellant.

***437** Honorable Lawrence G. Wasden, Attorney General, Boise, for appellant Idaho Department of Water Resources; Phillip J. Rassier argued.
Beeman & Associates, P.C., Boise, for appellant City of Pocatello.
Givens Pursley, LLP, Boise, for appellant Idaho Ground Water Appropriators, Inc.; Michael C. Creamer argued.
Arkoosh Law Offices, Chtd., Gooding, for respondent American Falls Reservoir District # 2; C. Thomas Arkoosh argued.
Ling, Robinson & Walker, Rupert, for respondents

A & B Irrigation and Burley Irrigation; Roger D. Ling argued.
Fletcher Law Office, Burley, for respondent Minidoka Irrigation District.
Barker Rosholt & Simpson, LLP, Boise and Twin Falls, for respondents Twin Falls Canal Company and Clear Springs Foods, Inc.
May, Sudweeks & Browning, LLP, Boise, for respondent Rangen.
Ringert, Clark Chtd., Boise, for respondents Nampa & Meridian Irrigation District and Thousand Springs Water Users Association; Daniel V. Steenson argued.TROUT, Justice.

This appeal is in response to a district court decision finding the Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules or Rules) facially unconstitutional based on the court's determination that the Rules lacked certain "procedural components" necessary to the proper administration of water rights under Idaho's prior appropriation doctrine. The Idaho Department of Water Resources (IDWR), together with the Intervenors, Idaho Ground Water Appropriators, Inc. (IGWA), appeal from that decision.

In 1994, pursuant to statutory authority found in Idaho Code sections 42-603 and 42-1805, the Director of the Idaho Department of Water Resources (Director), promulgated the CM Rules to provide the procedures for responding to delivery calls "made by the holder of a senior-priority surface or ground water right against the holder of a junior-*438 priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001. Thereafter, the CM Rules were submitted to the Idaho Legislature in 1995 pursuant to I.C. § 67-5291. The Legislature has not rejected, amended or modified any part of the Rules and they have, therefore, remained in effect as written. These Rules attempt to provide a structure by which the IDWR can jointly administer rights in interconnected surface water (diverting from rivers, streams and other surface water sources) and ground water sources. It is these CM Rules, their application and their relationship to the provisions in Article XV of the Idaho Constitution which are at the center of the dispute presently before the Court.

The issues initially arose when the Respondents, various irrigation districts and canal companies, submitted a petition for water rights administration and delivery of water (Delivery Call) to the Director in January, 2005, pursuant to the CM Rules. These districts were joined in the administrative proceeding by Intervenors, Rangen, Inc., Clear Springs Foods, Inc., Thousand Springs Water Users Association, and Idaho Power Company (Respondents and Intervenors collectively referred to as American Falls). Some of the entities comprising American Falls hold surface water rights in the Snake River canyon, while others hold storage contracts for space in the Upper Snake River reservoirs. In their January, 2005 Delivery Call, American Falls asked the Director to curtail junior ground water use during the 2005 irrigation season in order to meet the water needs of American Falls. On February 14, 2005, the Director issued an initial order (Initial Order) which, among other things, requested additional information from American Falls for the prior fifteen irrigation seasons relating to: diversions of natural flow, storage water, and ground water; number of water rights holders and their average monthly headgate deliveries; total amount of reservoir storage; amounts of water leased or made available to other users; and number of acres flood or sprinkler irrigated and types of crops planted. American Falls responded with information but also objected to the scope of the information requested. In the Initial Order, the Director indicated he would make a determination of likely injury after receiving inflow forecasts for the Upper Snake River Basin for the period April 1 through July 1, 2005. Within two weeks of receiving the joint inflow forecast on April 7, 2005, the Director issued a Relief Order, which determined that water shortages were reasonably likely in 2005 and would materially

injure American Falls. In the Relief Order, after making extensive findings of fact, the Director made the following conclusions of law which are pertinent to the issues presently before this Court:

...

20. Resolution of the conjunctive administration issue lies in the application of two well established principles of the prior appropriation doctrine: (1) the principle of "first in time is first in right" and (2) the principle of optimum use of Idaho's water. Both of these principles are subject to the requirement of reasonable use.

21. "Priority of appropriations shall give the better right as between those using the water" of the state. Art. XV, § 3, Idaho Const. "As between appropriators, the first in time is first in right." Idaho Code § 42-106.

22. "[W]hile the doctrine of 'first in time is first in right' [applies to ground water rights] a reasonable exercise of this right shall not block full economic development of underground water resources." Idaho Code § 42-226.

...

36. There currently is no approved and effectively operating mitigation in place to mitigate for injury, if any, to the water rights held by or for the benefit of the members of [American Falls].

...

45. Based upon the Idaho Constitution, Idaho Code, the Conjunctive Management Rules, and decisions by Idaho courts, ... it is clear that injury to senior priority surface water rights by diversion and use of junior priority ground water rights occurs when diversion under the junior rights intercept a ***439** sufficient quantity of water to interfere with the exercise of the senior primary and supplemental water rights for the authorized beneficial use. Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. Thus, senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.

...

45[sic]. Contrary to the assertion of [American Falls], depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. [American Falls] has no legal basis to seek the future curtailment of junior priority ground water rights based on injury alleged by [American Falls] to have occurred in prior years.

...

49. The members of [American Falls] should not be required to exhaust their available storage water prior to being able to make a delivery call against the holders of junior priority ground water rights. The members of [American Falls] are entitled to maintain a reasonable amount of carryover storage water to minimize shortages in future dry years pursuant to Rule 42.01....

The Director identified and ordered the junior ground water rights holders subject to administration pursuant to the American Falls' Delivery Call, to provide "replacement" water sufficient to offset the depletions in American Falls' water supply or face immediate curtailment. Pursuant to I.C. § 42-1701A(3), the Relief Order provided that aggrieved parties were entitled to an administrative hearing on the Relief Order if requested within fifteen days, but that otherwise the Relief Order would become final. Both American Falls and IGWA requested an administrative hearing, which was set by the Director. However, before the hearing could be held, American Falls filed this declaratory judgment action in district court on August 15, 2005. Later, American Falls requested stays and continuances in the hearing schedule and to date, the administrative challenges to the Relief Order remain pending.

American Falls' complaint alleged that the CM Rules are unconstitutional, as applied to their Delivery Call, but also sought a declaration that the CM Rules are void on their face. While the district court largely rejected American Falls' arguments, it

did grant summary judgment based on its finding that the CM Rules are facially unconstitutional on a different basis: a lack of "procedural components" of the prior appropriation doctrine that the court viewed as constitutionally mandated. The district court further held that the "reasonable carry-over" provision of CM Rule 42.01.g. is unconstitutional. In its decision, the district court stated that pursuant to I.C. § 67-5278, the actual and "threatened application" of the CM Rules to American Falls' Delivery Call would be considered in its analysis of the Rules' constitutionality.

1. Did the district court properly exercise jurisdiction before all administrative remedies were exhausted?
2. Did the district court err in holding that the CM Rules are facially unconstitutional based on a lack of certain "procedural components"?
3. Are the "reasonable carryover" provisions of Rule 42.01.g. of the CM Rules facially unconstitutional?
4. Are domestic and stock water rights properly exempt?
5. What is the effect of the severability clause?
6. Are the Respondents entitled to attorney's fees?
7. Did the district court improperly revoke its order allowing the City of Pocatello to intervene?

[1][2][3][4] In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. *State v. Rubbermaid Incorporated,* 129 Idaho 353, 355-356, 924 P.2d 615, 617-618 (1996); *Thomson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994). Upon review, the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *Id.; Bonz v. Sudweeks,* 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCoy v. Lyons,* 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz,* 119 Idaho at 541, 808 P.2d at 878.

[5][6][7][8] The constitutionality of a statute or administrative regulation is a question of law over which this Court exercises free review. *Moon v. North Idaho Farmers Ass'n,* 140 Idaho 536, 540, 96 P.3d 637, 641 (2004); *Rhodes v. Indus. Comm'n,* 125 Idaho 139, 868 P.2d 467 (1994). There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. *Id.*"[A]n appellate court is obligated to seek an interpretation of a statute that upholds it constitutionality." *In Re Bermudes (East. Idaho Reg. Med. Ctr. v. Minidoka County*), 141 Idaho 157, 159, 106 P.3d 1123, 1125 (2005); *Moon,* 140 Idaho at 540, 96 P.3d at 641. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases. *Id.*

[9] "Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Dep t. of A g. v. Curr y Bean,* 139 Idaho 789, 792, 86 P.3d 503, 506 (2004).

At the outset, it is important to commend the lengthy and scholarly opinion written by the district judge in this matter. The issues presented by the parties are extraordinarily complex and are matters of first impression. As exemplified by the Director's 46 page Relief Order and the district judge's 126 page decision, there are no easy answers. The district judge devoted much of his decision to a

detailed analysis of Idaho's Constitutional Convention in an effort to better understand what was intended by the drafters of our Constitution in Article XV. While the Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine, those principles are more easily stated than applied. These principles become even more difficult, and harsh, in their application in times of drought. Because of concepts like beneficial use, waste, reasonable means of diversion and full economic development, the decisions are highly fact driven and sometimes have unintended or unfortunate consequences. The district judge took a very difficult issue-the constitutionality of the CM Rules-and did an exemplary job in analyzing the issues presented, documenting the historical context of the problems and articulating a reasoned basis for his ultimate conclusions. While this opinion does not reach those same conclusions, we nevertheless accept large parts of the district judge's analysis and attempt to use his analysis to clarify our interpretation of the CM Rules.

It is also important to point out those issues which the district court decided against American Falls and from which no appeal was taken. The district court noted that the CM Rules incorporate concepts to be considered in responding to a delivery call, *such as: material injury; reasonableness of the* senior water right diversion; whether a senior right can be satisfied using alternate ***441** points and/or means of diversion; full economic development; compelling a surface user to convert his point of diversion to a ground water source; and reasonableness of use. The court observed that the Rules are not facially unconstitutional in having done so. The district court rejected American Falls' position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis. Moreover, the district court noted that if the statute or rule can be construed in a manner which is constitutional, the provision will withstand a challenge. (citing *State v. Prather,* 135 Idaho 770, 773, 25 P.3d 83, 86 (2001)).

It was the failure of the CM Rules to "also integrate the concomitant tenets and procedures related to a delivery call, which have historically been held to be necessary to give effect to the constitutional protections pertaining to senior water rights" with which the district court found fault, and it is that conclusion this opinion will analyze. The district court held:

Specifically, the [CM Rules] fail: 1) to establish a procedural framework properly allocating the well established burdens of proof; 2) to define the evidentiary standards that the Director is [to] apply in responding to a call; 3) to give the proper legal effect to a partial decree: 4) to establish objective criteria necessary to evaluate the aforementioned factors; and 5) to establish a workable, procedural framework for processing a call in a time frame commensurate with the need for water-especially irrigation water.

With that background, we proceed with an analysis of the issues raised on appeal by the IDWR.

A. Did the district court properly exercise jurisdiction before all administrative remedies were exhausted?

[10] Although both American Falls and IGWA exercised their right to request an administrative hearing within fifteen days of the Director issuing *the Relief Order, American Falls filed a complaint* in the district court for declaratory relief while the administrative hearing was pending. Historically, this Court has not permitted a party to seek declaratory relief until administrative remedies have been exhausted, unless the party is challenging a rule's facial constitutionality. I.C. § 67-5271; *Regan v. Kootenai County,* 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). The Idaho Administrative Procedure Act (IDAPA) provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271. Although the district court found the CM Rules were unconstitutional on their face, the district court discussed the constitutionality of the Rules "as applied" to the facts of this case. The question is whether the court wrongfully exercised

its authority in declaring the Rules invalid in reference to the particulars of this case before a factual record could be developed in an administrative hearing.

[11][12][13][14][15][16] A party may challenge a statute as unconstitutional "on its face" or "as applied" to the party's conduct. *State v. Korsen,* 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). A facial challenge to a statute or rule is "purely a question of law." *State v. Cobb,* 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Generally, a facial challenge is mutually exclusive from an as applied challenge. *Korsen,* 138 Idaho at 712, 69 P.3d at 132. For a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in *all* of its applications. *Id.* In other words, "the challenger must establish that no set of circumstances exists under which the [law] would be valid." *Id.* In contrast, to prove a statute is unconstitutional "as applied", the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional. *Korsen,* 138 Idaho at 712, 69 P.3d at 132. A district court should not rule that a statute is unconstitutional "as applied" to a particular case until administrative proceedings have concluded and a complete record has been developed. I.C. § 67-5277 (judicial review of disputed issues of fact must be confined to the agency record for judicial review); *Lindstrom v. Dist. Bd. Of Health Panhandle Dist. I,* 109 Idaho 956, 712 P.2d 657 (1985) (court engaged in an "as applied" analysis because no factual issues remained).

***442** [17] An "on its face" constitutional analysis may not be combined with an "as applied" constitutional analysis. *Korsen,* 138 Idaho at 712, 69 P.3d at 132. In other words, a court may hear both types of challenges to a rule's constitutional validity; however, it may not do a "hybridized" form of either test, in which the two tests are combined into a single analysis. *Id.; See Lindstrom v. Dist. Bd. Of Health Panhandle Dist. I,* 109 Idaho 956, 712 P.2d 657 (1985).

In this case, the district court recognized that parties must choose between either a facial or "as applied" constitutional challenge and that an "as applied" analysis is inappropriate before administrative proceedings have been fully completed. The court, nevertheless, went on to say that it would apply both a facial and as applied analysis because the case is "not conducive to such a rigid application." The district court acknowledged that the Director had not yet had an opportunity to fully determine if American Falls was entitled to administration of its water rights and therefore, "a strict 'as applied' analysis is not technically proper." The court explained that it planned to determine if the CM Rules were facially unconstitutional "in every application" while utilizing "the underlying facts in this case to determine whether the [CM Rules] are invalid, and to illustrate how the [CM Rules] were actually being applied." While it appears the district court attempted to conduct an analysis based on a facial challenge only, the court also referenced an earlier decision, the Notice of Clarification of Oral Order, dated December 16, 2005, and stated that it would apply both a facial and an as applied analysis to the extent the facts were already established and to illustrate how the court believed the Director would be applying the CM Rules.

[18][19] The district judge also concluded a broader analysis was necessary because the Director had no authority to rule on the constitutionality of the Rules. Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised. *Owsley v. Idaho Indus. Comm'n,* 141 Idaho 129, 134, 106 P.3d 455, 460 (2005). Other jurisdictions have also refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that no official in the proceeding is authorized to decide, reasoning that "to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue." *Foremost Ins. Co. v. Public*

Serv. Comm'n, 985 S.W.2d 793, 795 (Mo.Ct.App.1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record.

[20] The court further justified its incorporation of this case's facts into its analysis by asserting that I.C. § 67-5278"contemplates the use of a factual history of a case when determining a rule's validity." Idaho Code section 67-5278 provides a means by which a party may gain standing before a district court, prior to exhausting administrative remedies, in order to seek a declaratory judgment on a rule's validity. The statute requires that the rule itself or its "threatened application" interfere with or impair, or threaten to interfere with or impair, the legal rights or privileges of the petitioner. I.C. § 67-5278; *Rawson v. Idaho State Bd. Of Cosmetology,* 107 Idaho 1037, 1041, 695 P.2d 422, 426 (Ct.App.1985). In *Rawson,* the Court of Appeals made clear that I.C. § 67-5278 is intended to establish qualifications for standing and is not a vehicle by which courts may decide factual issues prior to the completion of an administrative proceeding. *Id.* The Court of Appeals concluded that the district court erred when it "did not limit its treatment of the unlawful conduct question to a determination of standing." *Id.* Further, the Court of Appeals held the factual question was addressed "prematurely" as the court "in essence took the issue from the Board and decided it de novo." *Id.* This Court is persuaded by the analysis in *Rawson* that the "threatened application" language in I.C. § 67-5278 is there to permit standing to challenge a rule, but does not eliminate the need for completion of administrative*443 proceedings for an as applied challenge.

[21] "Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock County Comm'rs,* 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003). Additionally, a district court cannot properly engage in an "as applied" constitutional analysis until a complete factual record has been developed. I.C. § 67-5277; *Lindstrom v. Dist. Bd. Of Health Panhandle Dist. I,* 109 Idaho 956, 712 P.2d 657 (1985). The district court should not blur the lines between a facial and as applied analysis by engaging in a hybrid analysis.

[22] There are two exceptions to the rule that an as applied analysis is appropriate only if all administrative remedies have been exhausted: when the interests of justice so require and when an agency has acted outside of its authority. *Regan,* 140 Idaho at 726, 100 P.3d at 619. It has not been argued, nor did the district court find, that the interests of justice required an as applied analysis here.

[23][24] As to the agency's statutory authority, to retain its authority over a controversy, an agency must be acting within the scope of the authority conferred upon it. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County,* 136 Idaho 809, 813, 41 P.3d 237, 241 (2001). While the district court discussed whether the Director had exceeded his statutory authority, it is a circuitous analysis. Clearly, the Director does have the statutory authority to promulgate the CM Rules. To the extent the CM Rules do not comply with the Idaho Constitution, the Director has exceeded his authority, but that still depends on an analysis in the first instance of whether the CM Rules do indeed contradict the constitutional provisions relating to the prior appropriation doctrine. Thus, the exception for when an agency exceeds its authority does not apply unless the CM Rules are facially unconstitutional. Therefore, this Court's review will be in terms of the CM Rules' constitutionality on their face and not in terms of the Rules' "threatened application" or "as applied." The issue is whether the challenged provisions are void in all possible applications, or whether there are a set of circumstances in which they may be constitutionally applied.

B. Did the district court err in holding that the CM Rules are facially unconstitutional based on a lack of certain "procedural components"?

As indicated above, the district court found that because the CM Rules failed to articulate certain procedural components of the prior appropriation doctrine according to Idaho law, the CM Rules are facially unconstitutional. After agreeing with the IDWR that "there is a lot more to Idaho's version of the prior appropriation doctrine than just 'first in time,' " the district court observed:

... there are two additional primary and essential principles of Idaho's version of the prior appropriation doctrine which are at issue in the administration of established rights but which are absent from the [CM Rules]. They are that in times of shortage there is the presumption of injury to a senior by the diversion of a junior, and the well engrained burdens of proof.

Again, later in the opinion, the district court further refined its conclusion that the CM Rules are constitutionally deficient "for failure to also integrate the concomitant tenets and procedures related to a delivery call ..." and said specifically they are deficient in that the CM Rules fail:1) to establish a procedural framework properly allocating the well established burdens of proof; 2) to define the evidentiary standards that the Director is [to] apply in responding to a call; 3) to give the proper legal effect to a partial decree: 4) to establish objective criteria necessary to evaluate the aforementioned factors; and 5) to establish a workable, procedural framework for processing a call in a time frame commensurate with the need for water-especially irrigation water.

***444** However, as the IDWR points out, CM Rule 20.02 provides that: "[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." "Idaho law," as defined by CM Rule 10.12, means "[T]he constitution, statutes, administrative rules and case law of Idaho." Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules. Due to the changing nature of the law and rules, it is unnecessary to incorporate extant law unless specifically necessary to a clear understanding of the particular Rule. This is a facial challenge to these Rules and if it is clear there are circumstances under which these Rules may be constitutionally applied to provide adequate procedural safeguards, then the Rules withstand a facial challenge. To the extent one can bring a constitutional claim based on a particular fact scenario that occurred and was permitted within the Rules, an "as applied" challenge is appropriate.

1. Burdens of proof and evidentiary standards

[25][26] Specifically, the district court found fault because the CM Rules fail to specifically articulate the applicable burdens of proof and evidentiary standards. After stating that the burdens are "integral to the constitutional protections accorded water rights," the court noted that "[T]he CMR's make absolutely no reference to these relative burdens of proof." The court also quoted the IDWR, which "acknowledged" that the Rules did not recite the burden of proof. The district court then concluded that "under these circumstances, no burden equates to impermissible burden shifting." The district court was critical of the Rules' failure to recite the burdens, rather than acknowledging that those standards were incorporated by reference in Rule 20.02 as part of Idaho statutory and case law. This was contrary to the court's obligation to "seek an interpretation of a statute that upholds it constitutionality." *In Re Bermudes (East. Idaho Reg. Med. Ctr. v. Minidoka County)*, 141 Idaho 157, 159, 106 P.3d 1123, 1125 (2005).

American Falls asserts on appeal that specific provisions of the Rules squarely contradict Idaho case law by placing the burden on the senior rather than the junior water user. American Falls argues that the seniors "are left to initiate a series of 'contested cases' and prove they are suffering 'material injury' before the Director and the watermasters will take any action. The result is a

lack of water to seniors, while juniors continue to divert unabated." Much emphasis is placed on CM Rule 30.01, which provides:

01. Delivery Call (Petition). When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following ...

...

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.

IDAPA 37.03.11.30.01. American Falls also cites Rule 40.01, which states that responses to calls are made when a senior files a delivery call "alleging" he is suffering "material injury" and upon a finding by the Director that material injury is occurring. This, American Falls argues, places the burden on the senior to prove material injury. A plain reading of the CM Rules does not support that interpretation, particularly in the context of a facial challenge to the Rules. The Rules simply require that a senior who is suffering injury file a delivery call with the Director and allege that the senior is suffering material injury. This is presumably to make the Director aware that such injury is occurring and to give substance to the complaint. Additionally, the Rules ask that the petitioner include all available information to support the call in order to assist the Director in his fact-finding. Nowhere do the Rules state that the senior must prove material injury before the Director will make such ***445** a finding. To the contrary, this Court must presume that the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02. While it is possible the Director could apply the CM Rules in an unconstitutional manner, that would be an opportune time for an "as applied" challenge; however now, in the absence of such facts indicating the Director has misapplied the Rules in violation of Idaho law, our analysis is limited to the Rules as written, or "on their face," and the Rules do not permit or direct the shifting of the burden of proof. Therefore, this Court does not find that the failure to explicitly recite certain procedural components such as the burdens of proof makes the CM Rules unconstitutional on their face.

The district court was also concerned that the CM Rules did not specifically articulate an appropriate standard for the Director to apply when responding to a delivery call: that is, should the required proof be clear and convincing, a preponderance of the evidence, or merely what the Director deems "reasonable." Again, the failure to state which standard applies does not mean the CM Rules can never be applied in a constitutional fashion-and the Rules' incorporation of the Idaho Constitution, statutes and case law would indicate to the contrary. Requirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules. There is simply no basis from which to conclude the Director can never apply the proper evidentiary standard in responding to a delivery call.

2. Timeliness in responding to a delivery call

[27] As discussed above, parties must generally exhaust administrative remedies before challenging a rule's constitutionality, particularly when asserting the rule is unconstitutional as applied to the facts, because a complete administrative record is necessary for such a determination. I.C. § 67-5277; *Owsley,* 141 Idaho at 134, 106 P.3d at 460. The issue regarding whether or not American Falls was denied due process at the administrative level due to the length of time it had to wait for a hearing is arguably an issue which has been factually established, at least as of the time this declaratory action was filed. In other words, the completion of an administrative record would not aid the Court in its determination of what has transpired so far in the application of the CM Rules to the current Delivery Call. We will address both challenges.

[28][29] The district court stated that the absence of any procedural time frames in the CM Rules "at

least as to curtailment for irrigation water" m akes the Rules unconstitutional. The court noted that although American Falls initiated a delivery call in January of 2005, as of May of 2006, the Director had not yet entered a final order. American Falls claims the process provided by the CM Rules does not allow for timely administration of its water rights. However, as noted above with respect to the burdens of proof and evidentiary standards, it is not necessary that every procedural requirement be recited in the CM Rules, when the Rules clearly have incorporated the provisions of the Idaho Constitution, statutes and case law. We agree with the district court's exhaustive analysis of Idaho's Constitutional Convention and the court's conclusion that the drafters intended that there be no unnecessary delays in the delivery of water pursuant to a valid water right. Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call. There is nothing in the Rules which would prohibit that from occurring, however. In other words, we cannot say there are no conceivable sets of circumstances under which the Rules could be constitutionally applied to provide for the timely delivery of water. Thus, the Rules are not facially defective in this regard.

The argument is also made that on the state of the record developed so far, the Rules are not being applied in a timely way to respond to American Falls' Delivery Call. Even if this Court embarked on an analysis of an as applied challenge to the Rules, the facts developed thus far do not support American Falls' contention that it was deprived of timely administration in response to the Delivery Call.

***446** American Falls submitted its Delivery Call to the Director in January of 2005, fearing that shortages would occur in the upcoming year. Thus, this was not at a time when water was actually needed. IDWR received the inflow forecast in April of 2005 and the Director issued a Relief Order less than two weeks later. The Director made the Order effective immediately pursuant to I.C. § 67-5247 (Emergency Proceedings), ordering juniors to provide "replacement" water in sufficient quantities to offset depletions in American Falls' water supplies. Thus, American Falls was provided timely relief in response to the Delivery Call in the form of the Relief Order issued just months after their call and only weeks after the Director received water forecasts for the upcoming year.

Incident to the Relief Order, the parties were entitled to a hearing. A hearing was initially set by the Director for August, 2005, still within the current irrigation season and during a time when American Falls had received some relief in response to its Delivery Call. Although both IGWA and American Falls exercised their right to a hearing and one was set, American Falls filed this action with the district court on August 15, 2005, before the hearing could be held. Subsequently, American Falls requested stays and continuances in the hearing schedule, one of which requested that the hearing be reset to no sooner than June 15, 2006. It appears that American Falls preferred to have its case heard outside of the administrative process and went to great lengths, first to remove the case from the administrative process and second, to delay the hearing. While the district court acknowledged it was "led to believe" that the parties had stipulated to delay the administrative resolution of the case pending the district court's decision, the court nevertheless also appeared to hold that delay against the Director and the CM Rules by finding there had been an unacceptable delay in responding to the Delivery Call. The record simply does not support that assertion and, as indicated above, there is likewise no basis for a determination that the CM Rules are unconstitutional in this regard.

Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources

are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

Absent additional evidence that the Director abused his discretion or that the delay in the hearing schedule was unreasonable despite the self-imposed extensions (both of which are appropriate to an "as applied" challenge on a fully developed administrative record), there is no basis for setting aside the CM Rules based upon the lack of specifically articulated time standards.

3. Lack of objective standards

[30] The district court noted that the CM Rules contain criteria for the Director to consider in responding to a delivery call, but was concerned by "the absence of any objective standards from which to evaluate the criteria." Rule 42 lists factors the Director may consider in determining material injury and whether the holders of water rights are using water efficiently and without waste, which are decisions properly vested in the Director. Those factors, of necessity, require some determination of "reasonableness" and it is the lack of an objective standard-something other than "reasonableness"-which caused the district court to conclude the Rules were facially defective. Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director. While it may be that the Director could apply these factors in an unreasonable way, the Rules are not facially deficient in not being more specific in defining what is "reasonable" in any given case. Again, this is ***447** an instance where an as applied constitutional challenge may be appropriate, but it does not justify voiding the Rules in their entirety for lack of objective standards beyond those specifically listed in Rule 42 and elsewhere.

4. Failure to give legal effect to a partial decree

[31] The district court stated that "with the exception of the water rights from Basin 01 (the main stem of the Snake River upstream from Milner Dam), the water rights at issue are within one or more organized water districts.... Significant to this analysis is that many of these rights have been adjudicated and decreed in the SRBA." These water rights have already been determined by the Snake River Basin Adjudication court, which, at the time of the adjudication of these rights, considered the Director's recommendations, which identified issues pertaining to quantity, purpose of use, point of diversion, etc. The CM Rules, the district court concluded, allow the Director to, in essence, re-adjudicate water rights by conducting a complete re-evaluation of the scope and efficiencies of a decreed water right in conjunction with a delivery call. In effect, the court stated, a senior who has an adjudicated water right through a partial decree must re-defend the elements of his adjudicated right each time he makes a delivery call.

As indicated previously, this Court can consider a facial challenge to the constitutionality of the Rules only when the challenger establishes that "*no* set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987) (emphasis added). As stated by the district court in this case, many of the water rights have already been adjudicated in the SRBA, and some may be in the process of being adjudicated. The court recognized that "a partial decree is not conclusive as to any post-adjudication circumstances or unauthorized changes in its elements." The district judge acknowledged that even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development. Even if this Court were to conclude that the CM Rules allow for further limited analysis in some instances where, depending on the case and its specific procedural background, there has been an adjudication, this does not mean the Rules are unconstitutional in *all*

applications. Rather, the Rules' constitutionality is dependent upon the procedural background of the specific case, which would make this an "as applied" constitutional attack.

CM Rule 42 lists factors "the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste...."IDAPA 37.03.11.42.01. Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion. *Id.* American Falls argues the Director is not authorized to consider such factors before administering water rights; rather, the Director is "required to deliver the *full quantity* of decreed senior water rights according to their priority" rather than partake in this re-evaluation. (emphasis in original brief). American Falls asserts the Rules are defective in giving the Director, in essence, the authority to negotiate with the senior water right holder regarding the quantity of water he will enforce under a delivery call-a quantity that in some instances, has already been adjudicated.

[32] Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed above in water rights administration. Specifically, the Director "has the duty and authority" to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM ***448** Rules, do not constitute a re-adjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42-1411(2)(a)-(j). However, reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication. *Schodde v. Twin Falls Land & Water Co.,* 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1912). Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.

Typically, the integration of priorities means limiting groundwater use for the benefit of surface water appropriators because surface water generally was developed before groundwater. The physical complications of integrating priorities often have parallels in the administration of solely surface water priorities. The complications are just more frequent and dramatic when groundwater is involved.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Do ctrine,* 22 Land & Water L.Rev. 63, 73 (1987).

Conjunctive administration "requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources." *A & B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). That is precisely the reason for the CM Rules and the need for analysis and administration by the Director. In that same vein, determining whether waste is taking place is not a re-adjudication because clearly that too, is not a decreed element of the right.

American Falls argues, though, that Rule 30.01 improperly shifts the burden to the senior appropriator who has already obtained a decreed right and forces the senior right holder to re-adjudicate or re-prove his decreed right whenever he makes a delivery call. The district court agreed and held that the Rules were fatally defective in not containing a presumption that "when a junior diverts or withdraws water in times of a water

shortage, it is presumed that there is injury to a senior." The court cited *Moe v. Harger,* 10 Idaho 302, 307, 77 P. 645, 647 (1904), as support for that holding. *Moe,* however, was a case dealing with competing surface water rights and this case involves interconnected ground and surface water rights. The issues presented are simply not the same. When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine,* 22 Land & Water L.Rev. 63, 74 (1987).

While perhaps the Rules can be read in different ways, they can be read consistently with constitutional and statutory principles. The Rules require the petitioner, that is the senior water rights holder, to file a petition alleging that by reason of diversion of water by junior priority ground water rights holders, the petitioner is suffering material injury. That is consistent with the statutory provision which requires a surface priority water right holder claiming injury by junior water right holders pumping from an aquifer to file a "written statement under oath" setting forth "the facts upon which [he] founds his belief that the use of his right is being adversely affected" by the pumping. I.C. § 42-237b. The Rules further provide that the petitioner file a description of his water rights, including the decree, license, permit or claim for such right, the water diversion and delivery system he is using and the beneficial use being made. The Rules then provide three additional types of information which must be provided by the petitioner; however, the Rules are clear in saying that the additional information should be provided only *if available* to the petitioner.

[33][34][35] The Rules should not be read as containing a burden-shifting provision to ***449** make the petitioner re-prove or re-adjudicate the right which he already has. We note that in the Initial Order entered in this case, the Director requested extensive information from American Falls for the prior fifteen irrigation seasons, to which American Falls objected in part. While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.,* 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

For the purposes of the facial challenge with which we are faced in this appeal, the CM Rules do not unconstitutionally force a senior water rights holder to re-adjudicate a right, nor do the Rules fail to give adequate consideration to a partial decree. In an "as applied" challenge, it would be possible to analyze on a fully developed factual record whether the Director has improperly applied the Rules to place too great a burden on the senior water rights holder. Facially, however, the Rules do not do so.

C. Are the "reasonable carryover" provisions of Rule 42.01.g. of the CM Rules facially unconstitutional?

[36][37][38] Storage water is water held in a reservoir and is intended to assist the holder of the water right in meeting their decreed needs. Carryover is the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water. *See Rayl v. Salmon River Canal Co.,* 66 Idaho 199, 157 P.2d 76 (1945). One may acquire storage water rights and receive a vested priority date and quantity, just as with any other water right. I.C. § 42-202. There is no statutory provision for obtaining a decreed right to "carryover" water. Obviously, the quantity of any water available at the end of the irrigation year is dependent upon a number of factors like the irrigators' needs during the season, reservoir capacity and amount of water in the reservoir at the beginning of the season.

[39] The district court held that the CM Rules' provision allowing a "reasonable" amount of carry-over storage injures vested senior storage water rights in violation of the Idaho Constitution and water distribution statutes. The relevant provision is found in CM Rule 42, which provides:

042: DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

...

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employment reasonable diversion and conveyance efficiency and conservation practices; provided, however, **the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years.** In determining a reasonable amount of carry-over storage, the Director shall consider the average annual ***450** rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.

IDAPA 37.03.11.042.01.g. (emphasis added). In responding to a delivery call, this Rule lists factors for the Director to consider in making his determination, including the possible use of some storage water by the senior in order to avoid unnecessarily cutting off water to a junior water right holder. It is the district court's position that: "absent a proper showing of waste, senior storage right holders are allowed to store up to the quantity stated in their storage right, free of diminishment by the Director." Thus, the question is: are the holders of storage water rights also entitled to insist on all available water to carryover for future years in order to assure that their full storage water right is met (regardless of need).

The district court's decision is based on the assumption that storage rights are property rights entitled to legal protection. *Washington County Irrigation Dist. v. Talboy,* 55 Idaho 382, 385, 43 P.2d 943, 945 (1935). In *Talboy,* this Court held that when water is stored, it becomes "the property of the appropriators ... impressed with the public trust to apply it to a beneficial use." *Id.* Importantly, *Talboy* did not address the issue of carryover. The Court has also held that if one appropriates water for a beneficial use, he has a valuable right entitled to protection. *Murray v. Public Utilities Comm'n,* 27 Idaho 603, 619, 150 P. 47, 50 (1915); *Bennett v. Twin Falls North Side Land & Water Co.,* 27 Idaho 643, 651, 150 P. 336, 339 (1915). Nevertheless, that property right is still subject to other requirements of the prior appropriation doctrine. The question is whether the Director's authority to limit the amount of water a surface storage water right holder can save and carryover to the next year, is an unconstitutional impairment of storage water rights. IGWA and IDWR argue that Idaho law does not allow curtailment of vested junior rights when the senior does not need additional water to achieve the authorized beneficial use. They cite to *Schodde v. Twin Falls Land & Water Co.,* 161 F. 43 (9th Cir.1908), which held that water rights must be exercised with "some regard to the rights of the

public" and "necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Id.* at 47. It is IGWA's position based on *Schodde,* that even vested water rights are not absolute; rather, such rights are limited to some extent, by the needs of other water users and thus, it is in accordance with Idaho law to place a "reasonable" limit on the amount of water a person may carryover for storage. The point of the reasonable carry-over provision, argues IGWA, is to determine whether the senior has a sufficient water supply to meet its actual needs, rather than routinely permitting water to be wasted through storage and non-use.

This Court has invalidated a rule adopted by a canal company that allowed an individual shareholder of the company to hold-over his allotted share of stored water free from limitations, which reduced the allocated amount of other shareholders. *Glavin v. Salmon River Canal Co.,* 44 Idaho 583, 258 P. 532 (1927). The Court invalidated the rule based on "possible abuses," such as a situation where a shareholder does not require the full use of his allotment, but he carries it over to the detriment of others. *Id.* at 589, 258 P. at 534. The Court noted:
... and we think it clear that, whatever may be the exact nature of the ownership by an appropriator of water thus stored by him, any property rights in it must be considered and construed with reference to the reasonableness of the use to which the water stored is applied or to be applied.

Id. at 588-589, 258 P. at 534.

Thus, it is argued that the same logic supports CM Rule 42, which allows the Director to refrain from curtailing junior water rights if a senior has sufficient storage rights to meet his needs. However, the Court in *Rayl v. Salmon River Canal Co.,* 66 Idaho 199, 157 P.2d 76 (1945) limited the *Glavin* holding to the facts in that case: "Quite obviously, the above opinion did not hold and was not intended to hold that irrigation organizations and/or appropriators of water could not accumulate within their appropriations*451 and hold storage over from one season to the next.... The court merely held the particular rule offended in certain particulars." *Rayl,* 66 Idaho at 201, 157 P.2d at 77. This is simply a recognition that it is permissible for the canal company to hold water over from one year to the next absent abuse. The Court upheld the amended rules in *Rayl* because the earlier deficiencies and possible abuses identified in *Glavin* had been rectified. The Court also recognized the "fundamental difference" between "the diversion and use of water from a flowing stream and a reservoir." *Id.* at 208,157 P.2d at 80. These cases do not address situations where stored carryover water was, at the time of the litigation, being wasted by storing away excessive amounts in times of shortage. Rather, the Court foresaw abuses that could occur when one is allowed to carryover water despite detriment to others. Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional. The CM Rules are not facially unconstitutional in permitting some discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.

[40][41] Again, this is an area where the Rules are not facially invalid, but there is room for challenge on an "as applied" basis if the Rules are not applied in a manner consistent with the Constitution. Clearly American Falls has decreed storage rights. Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law of Idaho. While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an

absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. This is certainly not unfettered discretion, nor is it discretion to be exercised without any oversight. That oversight is provided by the courts, and upon a properly developed record, this Court can determine whether that exercise of discretion is being properly carried out. For the purposes of this appeal, however, the CM Rules are not facially defective in providing some discretion in the Director to carry out this difficult and contentious task. This Court upholds the reasonable carryover provisions in the CM Rules.

D. Are domestic and stock water rights properly exempt?

[42] Not specifically raised by IDWR, although raised generally in its argument that the district court erred in voiding the CM Rules in their entirety, is the issue relating to the CM Rules' exclusion of domestic and stock water rights from administration. The district court concluded that the exclusion of these rights is unconstitutional and amounts to an unlawful taking of prior vested water rights. Article XV, § 3 of the Idaho Constitution gives priority to domestic water rights but requires that junior water right holders must compensate seniors for any taking of their water. Article XV, § 3 of the Idaho Constitution provides, in pertinent part:

... Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose.... But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking*452 of private property and public use, as referred to in section 14 of article I of this Constitution.

The relevant CM Rules provision also provides domestic water rights with priority, exempting them from delivery calls; however, unlike the Constitution, the Rules do not address whether the senior user will be compensated for the taking:20.11. Domestic and Stock Watering Ground Water Rights Exempt. A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering is within the limits of the definition set forth in Section 42-1401A(11), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stock watering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.11.020.11. The district court concluded that this Rule permits domestic users to take senior water rights without having to provide any compensation. The question is if CM Rule 20.11 is in direct conflict with Article XV, Section 3 or if the two can be read together and applied in accordance with the Constitution. As discussed above, a provision of this same rule, Rule 20.02, incorporates by reference all Idaho law, including the Idaho Constitution, into the CM Rules. The Rules do not exclude the possibility of a takings claim to provide such compensation. The Rules simply restate the portion of Article XV, Section 3 that gives priority to domestic water users, stating that senior non-domestic users cannot curtail their use via a delivery call.

There is no requirement that the CM Rules must incorporate every possible remedy to a senior who feels that his water right has been improperly reduced. A separate takings claim is certainly not prohibited by the Rules. The case before us is a

facial challenge; until faced with an appropriate factual record complaint, we decline to speculate about whether a senior water rights holder will be properly compensated. The Rules are sufficient as they are written.

E. What is the effect of the severability clause?

The district court made no findings with respect to the severability clause found in Rule 4 of the CM Rules. IDAPA 37.03.11.004. The trial court simply concluded that the Rules were unconstitutional in their entirety and therefore completely void. Because this Court concludes that the district court erred in that determination, we need not address the impact of the severability clause and whether some provisions could continue in effect. *See, e.g., In re SRBA No. 39576,* 128 Idaho 246, 264, 912 P.2d 614, 632 (1995) ("When determining whether the remaining provisions in a statute can be severed from the unconstitutional sections, this Court will, when possible, recognize and give effect to the intent of the Legislature as expressed through a severability clause in the statute.").

F. Are the Respondents entitled to attorney's fees?

American Falls has requested attorney fees on appeal if it prevails. Attorney's fees may be awarded to the prevailing party pursuant to I.C. § 12-117 if the Court finds that "the party against whom the judgment is rendered acted without a reasonable basis in fact or law." I.C. § 12-117. American Falls is not the prevailing party in this appeal and therefore, an award of fees is denied.

G. Did the district court improperly revoke its order allowing the City of Pocatello to intervene?

[43] In the action below, the City of Pocatello (City) moved to intervene as a party to the litigation, either by permission or as a matter of right. The motion was granted by the district court, without indicating whether it was permissive or by right, conditioned on the City's representation that it would not take any action which would delay the proceedings. At that point in the proceedings, ***453** the district court had already heard arguments on a motion to dismiss and was drafting its opinion. There had also been motions filed for summary judgment which were noticed for hearing. The district court issued its decision denying the motion to dismiss. Ten days after the district court's ruling and eleven days before the hearing set on the pending motions, the City then moved to disqualify the judge for cause. The basis for the City's motion was an alleged conflict of interest, which the judge had disclosed to the City three months earlier. The district court ruled that the City had misrepresented its position and was taking action to delay the proceedings; therefore, the court revoked the earlier order granting intervention and denied the City's motion to disqualify. In that final order, the district court clarified that the earlier intervention had been granted on a permissive basis and not because of any determination that the City had a right to intervene. The City then appealed the decision denying intervention and also appealed the district judge's refusal to disqualify himself.

Pursuant to I.R.C.P. 24, a judge may grant either permissive intervention or intervention of right. Paraphrasing, intervention is a matter of right according to Rule 24:(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the subject of the action and the applicant is so situated that disposition of the action may impair the applicant's ability to protect that interest, "unless the applicant's interest is adequately represented by existing parties." I.R.C.P. 24(a). In its order, the district court determined that the City's interests as a holder of water rights were adequately represented by other parties to this action who likewise held water rights. "[I]ntervention as of right has been considered to be a mixed question of law and fact involving the discretion of a trial judge." *Rodriguez v. Oakley Valley Stone, Inc.,* 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). The district court did not err in determining that the City's interests were adequately represented by others and, therefore, the City could only intervene if granted permission to do so.

[44][45][46][47] A district court's decision to grant or deny permissive intervention is a matter of discretion. *Farrell v. Bd. of Comm'rs of Lemhi County,* 138 Idaho 378, 64 P.3d 304 (2002). In determining whether the trial court properly exercised its discretion, this Court engages in a three-part inquiry to determine: whether the trial court correctly perceived the issue as one of discretion; whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and whether the trial court reached its decision by an exercise of reason. *Id.* "On appeal, the appellant carries the burden of showing that the district court committed error. Error will not be presumed but must be affirmatively shown on the record by appellant." *Id.* at 390, 64 P.3d at 316, quoting *Western Cmty Ins. Co. v. Kickers Inc.,* 137 Idaho 305, 306, 48 P.3d 634, 635 (2002).

In its decision revoking the prior order granting intervention, the district court indicated that this was a discretionary decision. The district court also acted within its discretion and consistently with the legal standards and reached its decision through an exercise of reason. Specifically, the district court found that the City knew of the judge's alleged conflict as early as 2000, and that it was disclosed again by the judge two months before the City sought to intervene. Further, the district court observed that the City did not seek disqualification until ten days after the court ruled on the first contested motion. Finally, the district court concluded that intervention was sought for the purpose of prejudicial delay and the City had engaged in improper forum shopping. The City has not met its burden of demonstrating that the district court committed error in its exercise of discretion; thus, the district court properly revoked the order allowing the City to intervene. Consequently, there is no need to address the City's argument about the ruling on its motion to disqualify the district judge.

To the extent the district court engaged in an analysis of the constitutionality of the Rules "as applied" to the facts of this case ***454** before administrative remedies were exhausted, it was in error. As to the perceived lack of procedural components articulated in the Rules, Rule 20.02 incorporates Idaho law; therefore, the failure to recite certain burdens and evidentiary standards, set specific timelines and set objective standards does not make the Rules facially unconstitutional. The CM Rules also survive a facial challenge in the recognition given to partial decrees and in the treatment of carryover water. The decision of the district court granting partial summary judgment to American Falls is reversed. The district court's revocation of the City's motion to intervene was not an abuse of discretion and is, therefore, affirmed. We award costs on appeal to the Appellants.

Chief Justice SCHROEDER and Justices BURDICK, JONES and KIDWELL, Pro Tem concur.

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